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ELOGE OF MONTESQUIEU.

Charles de Secondat, baron of La Brede and of Montesquieu, late president *a mortier* of the parliament of Bordeaux, member of the French academy of sciences and belles lettres of Prussia, and of the Royal Society of London, was born at the Castle of La Brede, near Bordeaux, the 18th of January, 1689, of a noble family of Guienne.

The early marks of his genius, a presage sometimes so deceitful, was not so in Charles de Secondat: he discovered very soon what he one day would be, and his father employed all his attention to cultivate this rising genius, the object of his hope and of his tenderness. At the age of twenty, young Montesquieu already prepared materials for the Spirit of Laws, by a well-digested extract from those immense volumes which compose the body of the civil law: thus, heretofore, Newton laid, in his early youth, the foundation of works which have rendered him immortal. The study of jurisprudence, however, though less dry to M. de Montesquieu than to the most part of those who apply to it, because he studied it as a philosopher, was not sufficient for the extent and activity of his genius. He enquired deeply, at the same time, into subjects still more important and more delicate,* and discussed them in silence, with that

* It was a work in the form of letters, the purpose of which was to prove that the idolatry of most of the Pagans did not appear to deserve eternal damnation.

wisdom, with that decency, and with that equity, which he has since discovered in his works.

A brother of his father, president *a mortier* of the parliament of Bordeaux, an able Judge and virtuous citizen, the oracle of his own society and of his province, having lost an only son, and wanting to preserve, in his own corps, that elevated spirit which he had endeavored to infuse into it, left his fortune and his office to M. de Montesquieu. He had been one of the counsellors of the parliament of Bordeaux since the 24th of February, 1714, and was received president *a mortier* the 13th of July, 1716.

Some years after, in 1722, during the King's minority, his society employed him to present remonstrances upon occasion of a new impost. Placed between the throne and the people, he filled, like a respectful subject and courageous magistrate, the employment, so noble, and so little envied, of making the cries of the unfortunate reach the sovereign :— the public misery, represented with as much address as force of argument, obtained that justice which it demanded. This success, it is true, much more unfortunately for the state than for him, was of as short continuance as if it had been unjust. Scarce had the voice of the people ceased to be heard, but the impost, which had been suppressed, was replaced by another: but the good citizen had done his duty.

He was received the 3d of April, 1716, into the academy of Bordeaux, which was then only beginning. A taste for music, and for works of pure entertainment, had at first assembled together the members who composed it. M. de Montesquieu believed, with reason, that the rising ardor and talents of his friends might be employed with still greater advantage in physical subjects. He was persuaded that nature, so worthy of being beheld every where, found also, in places, eyes worthy of viewing her; that, on the contrary, works of taste not admitting of mediocrity, and the metro-

polis being the centre of men of abilities and opportunities of improvement in this way, it was too difficult to gather together, at a distance from it, a sufficient number of distinguished writers. He looked upon the societies for belles lettres, so strangely multiplied in our provinces, as a kind, or rather as a shadow, of literary luxury, which is of prejudice to real opulence, without even presenting us with the appearance of it. Luckily the Duke de la Force, by a prize which he had just founded at Bordeaux, seconded these rational and just designs. It was judged that an experiment properly made would be preferable to a weak discourse or a bad poem; and Bordeaux got an academy of sciences.

M. de Montesquieu, not at all eager to shew himself to the public, seemed, according to the expression of a great genius, to wait for an age ripe for writing. It was not till 1721, that is to say, at 32 years of age, that he published the Persian Letters. The Siamois, and the serious and comic amusements, might have furnished him with the idea of it; but he excelled his model. The description of oriental manners, real or supposed, of the pride and phlegm of Asiatic love, is but the smallest object of these letters; it only serves, so to speak, as a pretence for a delicate satire upon our manners, and for treating of several important subjects, which the author went to the bottom of, while he only appeared to glance at them. In this kind of moving picture, Usbec chiefly exposes, with as much genteel easiness as energy, whatever amongst us most struck his penetrating eyes: our way of treating the most silly things seriously, and of turning the most important into a joke;—our conversations which are so blustering and so frivolous; our impatience even in the midst of pleasure itself; our prejudices and our actions perpetually in contradiction with our understandings; so much love of glory joined with so much respect for the idol of court-favor; our courtiers so mean and so vain; our exterior politeness to, and our real contempt of, strangers, or our affected regard for them; the

fantasticness of our tastes, than which there is nothing lower but the eagerness of all Europe to adopt them; our barbarous disdain for the two most respectable occupations of a citizen, commerce and magistracy; our literary disputes, so keen and so useless; our rage for writing before we think, and for judging before we understand. To this picture, which is lively, but without malice, he opposes, in the apologue of the Troglodytes, the description of a virtuous people, become wise by misfortunes: a piece worthy of the portico. In another place, he represents philosophy, which had been a long time smothered, appearing all of a sudden, regaining, by a rapid progress, the time which she had lost; penetrating even amongst the Russians at the voice of a genius which invites her; while, among other people of Europe, superstition, like a thick atmosphere, prevents that light, which surrounds them on all hands, from reaching them. In fine, by the principles which he has established concerning the nature of ancient and modern government, he presents us with the bud of those bright ideas which have been since developed by the author in his great work.

These different subjects, deprived at present of the graces of novelty, which they had when the Persian Letters first appeared, will forever preserve the merit of that original character which the author has had the art to give them; a merit by so much the more real, that in this case it proceeds alone from the genius of the writer, and not from that foreign veil with which he covered himself; for Usbec acquired, during his abode in France, not only so perfect a knowledge of our morals, but even so strong a tincture of our manners, that his style makes us often forget his country. This small defect in point of probability was perhaps not without design and address: when he was exposing our follies and vices, he wanted without doubt also to do justice to our advantages. He was fully conscious of the insipidity of a direct panegyric: he has more delicately praised us, by so often assuming our own air to satirize us more agreeably.

Notwithstanding the success of this work, M. de Montesquieu did not openly declare himself the author of it. Perhaps he thought that by this means he would more easily escape that literary satire, which spares anonymous writings the more willingly, because it is always the person, and not the work, which is the aim of its darts. Perhaps he was afraid of being attacked on account of the pretended contrast of the Persian Letters with the gravity of his office; a sort of reproach, said he, which critics never fail to make, because it requires no effort of genius. But his secret was discovered, and the public already pointed him out to the French academy. The event demonstrated how prudent M. de Montesquieu's silence had been. Usbec expresses himself sometimes freely enough, not concerning the fundamentals of Christianity, but about matters which too many people affect to confound with Christianity itself; about the spirit of persecution with which so many Christians have been animated; about the temporal usurpation of ecclesiastic power; about the excessive multiplication of monasteries, which deprive the state of subjects, without giving worshippers to God; about some opinions which have in vain been attempted to be established as principles; about our religious disputes, always violent and always fatal. If he appears any where to touch upon more delicate questions, and which more nearly interest the Christian religion, his reflections, weighed with justice, are in fact very favorable to revelation; because he only shews how little human reason, left to itself, knows concerning these subjects. In a word, among the genuine letters of M. de Montesquieu the foreign printer had inserted some by another hand; and they ought at least, before the author was condemned, to have distinguished which properly belonged to him. Without regard to these considerations, on the one hand, hatred under the name of zeal, and, on the other, zeal without discernment or understanding, rose and united themselves against the Persian Letters. Informers, a species of men dangerous and

base, which even in a wise government are unfortunately sometimes listened to, alarmed, by an unfaithful extract, the piety of the ministry. M. de Montesquieu, by the advice of his friends, supported by the public voice, having offered himself for that place in the French academy vacant by the death of M. de Sacy, the minister wrote a letter to the academy, that his majesty would never agree to the election of the author of the Persian Letters; that he had not read the book; but that persons in whom he placed confidence had informed him of their poisonous and dangerous tendency. M. de Montesquieu perceived what a stroke such an accusation might be to his person, his family, and the tranquillity of his life. He neither put so high a price upon literary honors, either keenly to seek them, or to affect to disdain them when they came in his way, nor, in a word, to regard the simple want of them as a misfortune: but a perpetual exclusion, and especially the motives of that exclusion, appeared to him to be an injury. He saw the minister; declared to him that, for particular reasons, he did not own the Persian Letters; but that he would be still farther from disowning a work for which he believed he had no reason to blush; and that he ought to be judged after a reading, and not upon an information. At last the minister did what he ought to have begun with; he read the book, loved the author, and learned to place his confidence better. The French academy was not deprived of one of its greatest ornaments, and France had the happiness to preserve a subject which superstition or calumny was ready to deprive her of; for M. de Montesquieu had declared to the government, that, after that kind of affront which they were about to put upon him, he would go among foreigners, who with open arms offered to receive him, in quest of that safety, that repose, and perhaps those rewards, which he might have hoped for in his own country. The nation would have deplored this loss, and the disgrace of it would notwithstanding have fallen upon it.

The late marshal d'Estrees, at that time director of the French academy, conducted himself upon this occasion like a virtuous courtier and a person of a truly elevated mind: he was neither afraid of abusing his credit nor of endangering it; he supported his friend and justified Socrates. This act of courage, so dear to learning, so worthy of being imitated at present, and so honorable to the memory of marshal d'Estrees, ought not to have been forgotten in his panegyric.

M. de Montesquieu was received the 24th of January, 1728. His oration is one of the best which has been pronounced upon a like occasion: its merit is by so much the greater, that those who were to be received, till then confined by those forms and by those *eloges* which were in use and to which a kind of prescription subjected them, had not as yet dared to step over this circle to treat of other subjects, or had not at least thought of comprehending them in it. Even in this state of constraint he had the happiness to succeed. Among several strokes with which his oration shines, we may easily distinguish the deep thinking writer by the single portrait of cardinal Richlieu, *who taught France the secret of its strength, and Spain that of its weakness; who freed Germany from her chains and gave her new ones.* We must admire Monsieur de Montesquieu for having been able to overcome the difficulty of his subject, and we ought to pardon those who have not had the same success.

The new academician was by so much the more worthy of this title, that he had not long before renounced every other business to give himself entirely up to his genius and taste. However important the place which he occupied was, with whatever judgment and integrity he might have fulfilled its duties, he perceived that there were objects more worthy of employing his talents; that a citizen is accountable to his country and to mankind for all the good which he can do; and that he could be more useful to one and the other, by instructing them with his writings, than he could be by de-

termining a few particular disputes in obscurity. All these reflections determined him to sell his office. He was no longer a magistrate, and was now only a man of letters.

But, to render himself useful by his works to different nations, it was necessary that he should know them: it was with this view that he undertook to travel; his aim was to examine every where the natural and moral world, to study the laws and constitution of every country; to visit the learned, the writers, the celebrated artists; every where to seek for those rare and singular geniuses whose conversation sometimes supplies the place of many years observation and residence. M. de Montesquieu might have said, like Democritus, "I have forgot nothing to instruct myself: I have quitted my country and travelled over the universe, the better to know truth; I have seen all the illustrious personages of my time." But there was this difference between the French Democritus and him of Abdera, that the first travelled to instruct men, and the second to laugh at them.

He first went to Vienna, where he often saw the celebrated Prince Eugene. This hero, so fatal to France, (to which he might have been so useful,) after having given a check to the fortune of Lewis XIV. and humbled the Ottoman pride, lived during the peace without pomp, loving and cultivating letters in a court, where they were little honored, and setting an example to his masters how they should protect them. M. de Montesquieu thought that he could discover in his conversation some remains of affection for his ancient country. Prince Eugene especially discovered it, as much as an enemy could, when he talked of the fatal consequences of that intestine division which has so long troubled the church of France: the statesman foresaw its duration and effects, and foretold it like a philosopher.

M. de Montesquieu left Vienna to visit Hungary, an opulent and fertile country, inhabited by a haughty and generous

people, the scourge of its tyrants and the support of its sovereigns. As few persons know this country well, he has written with care this part of his travels.

From Germany he went to Italy: he saw at Venice the famous Mr. Law, who had nothing remaining of his grandeur but projects fortunately destined to die away in his own head, and a diamond which he pawned to play at games of hazard. One day the conversation turned on the famous system which Law had invented; an epoch of so many calamities and so many great fortunes, and especially of a remarkable corruption in our morals. As the parliament of Paris, the immediate depository of the laws during a minority, had made some resistance to the Scotch minister on this occasion, M. de Montesquieu asked him why he had never tried to overcome this resistance by a method almost always infallible in England, by the grand mover of human actions, in a word, by money. *These are not*, answered Law, *geniuses so ardent and so generous as my countrymen, but they are much more incorruptible.* We shall add, without any prejudice of national vanity, that a society, which is free for some short limited time, ought to resist corruption more than one which is always so: the first, when it sells it's liberty, loses it; the second, so to speak, only lends it, and exercises it even when it is doing so. Thus the circumstances and nature of government give rise to the vices and virtues of nations.

Another person, no less famous, whom M. de Montesquieu saw still oftener at Venice, was Count de Bonneval. This man, so known by his adventures, which were not yet at an end, and flattered with conversing with so good a judge, and one so worthy of hearing them, often related to him the remarkable circumstances of his life, recited the military actions in which he had been engaged, and drew the characters of those generals and ministers whom he had known. M. de Montesquieu often recalled to mind these conversations, and related different strokes of them to his friends.

He went from Venice to Rome. In this ancient capital of the world, which is still so in some respects, he applied himself chiefly to examine that which distinguishes it most at present; the works of Raphael, of Titian, and of Michael Angelo. He had not made a particular study of the fine arts, but that expression, which shines in the master-pieces of this kind, infallibly strikes every man of genius. Accustomed to study nature, he knew her again when well imitated, as a like portrait strikes all those who are familiarly acquainted with the original. Those productions of art must indeed be wretched whose whole beauty is only discernable by artists.

After having travelled over Italy, M. de Montesquieu came to Switzerland. He carefully examined those vast countries which are watered by the Rhine. There was nothing more for him to see in Germany, for Frederic did not yet reign. He stopped afterwards some time in the United Provinces, an admirable monument what human industry animated by a love of liberty can do. At last he went to England, where he staid three years. Worthy of visiting and entertaining the greatest of men, he had nothing to regret but that he had not made this voyage sooner. Newton and Locke were dead. But he had often the honor of paying his respects to their protectress, the celebrated queen of England, who cultivated philosophy upon a throne, and who properly esteemed and valued M. de Montesquieu. He was no less well received by the nation, which, however, was not obliged to follow the example of its superiors on this occasion. He formed at London intimate friendships with men accustomed to think, and to prepare themselves for great actions by profound studies; with them he instructed himself in the nature of the government, and attained to a thorough knowledge of it. We speak here after the public testimonies which have been given him by the English themselves, so jealous of our advantages, and so little disposed to acknowledge any superiority in us.

As he had examined nothing either with the prejudice of an enthusiast or the austerity of a cynic, he brought back from his travels neither a saucy disdain for foreigners, nor a still more misplaced contempt for his own country. It was the result of his observations, that Germany was made to travel in, Italy to sojourn in, England to think in, and France to live in.

After his return to his own country, M. de Montesquieu retired for two years to his estate of La Brede. He there enjoyed in peace that solitude which our having viewed the tumult and hurry of the world serves to render more agreeable. He lived with himself after having so long lived in a different way; and, what interests us most, he put the last hand to his work *On the Cause of the Grandeur and Declension of the Romans*, which appeared in 1734.

Empires, like men, must encrease, decay, and be extinguished. But this necessary revolution has often hidden causes, which the veil of time conceals from us, and which mystery, or their apparent minuteness, has even sometimes hid from the eyes of contemporaries.

Nothing in this respect resembles modern history more than ancient history. That of the Romans, however, deserves, in this respect, to be made an exception of; it presents us with a rational policy, a connected system of aggrandizement, which does not permit us to attribute the fortune of this people to obscure and inferior springs. The causes of the Roman grandeur may then be found in history, and it is the business of the philosopher to discover them. Besides, there are no systems in this study as in that of physic; these are almost always overthrown, because one new and unforeseen experiment can overturn them in an instant: on the contrary, when we carefully collect the facts which the ancient history of a country transmits to us, if we do not always gather together all the materials which we

can desire, we can at least hope one day to have more of them. A careful study of history, a study so important and so difficult, consists in combining in the most perfect manner these defective materials: such would be the merit of an architect, who, from some curious learned remains, should trace, in the most probable manner, the plan of an ancient edifice; supplying, by genius and happy conjectures, what was wanting in those unformed and mutilated ruins.

It is in this point of view that we ought to consider the work of M. de Montesquieu. He finds the causes of the grandeur of the Romans in that love of liberty, of labor, and of their country, which was instilled into them during their infancy; in those intestine divisions which gave an activity to their genius, and which ceased immediately upon the appearance of an enemy; in that constancy after misfortunes, which never despaired of the republic; in that principle they adhered to of never making peace but after victories; in the honor of a triumph, which was a subject of emulation among the generals; in that protection which they granted to those people who rebelled against their kings; in the excellent policy of permitting the conquered to preserve their religion and customs; and that of never having two enemies upon their hands at once, and of bearing every thing of the one till they had destroyed the other. He finds the causes of that declension in the aggrandizement of the state itself: in those distant wars, which, obliging the citizens to be too long absent, made them insensibly lose their republican spirit; in the privilege of being citizens of Rome, granted to so many nations, which made the Roman people at last become a sort of many-headed monster; in the corruption introduced by the luxury of Asia; in the proscriptions of Sylla, which debased the genius of the nation, and prepared it for slavery; in that necessity which the Romans found themselves in, of having a master while their liberty was become burthensome to them; in that necessity they

were obliged to of changing their maxims when they changed their government; in that series of monsters who reigned, almost without interruption, from Tiberius to Nerva, and from Commodus to Constantine; in a word, in the translation and division of the empire, which perished first in the West by the power of barbarians, and which, after having languished several ages in the East, under weak or cruel emperors, insensibly died away, like those rivers which disappear in the sands.

A very small volume was enough for M. de Montesquieu to explain and unfold so interesting and vast a picture. As the author did not insist upon the detail, and only seized on the most fruitful branches of his subject, he has been able to include, in a very small space, a vast number of objects distinctly perceived, and rapidly presented, without fatiguing the reader. While he points out a great deal to us, he leaves us still more to reflect upon; and he might have entled his book, *A Roman History for the Use of Statesmen and Philosophers.*

Whatever reputation M. de Montesquieu had acquired by this last work, and by those which had preceded it, he had only cleared the way for a far grander undertaking, for that which ought to immortalize his name, and render it respectable to future ages. He had long ago formed the design, and had meditated for twenty years upon the execution of it; or to speak more properly, his whole life had been a perpetual meditation upon it. He had first made himself in some respect a stranger in his own country, better to understand it at last: he had afterwards travelled over all Europe, and profoundly studied the different people who inhabit it. The famous island, which glories so much in her laws, and which makes so bad an use of them, had been to him, in his long tour, what the isle of Crete had formerly been to Lycurgus, a school where he had known well how to instruct himself without approving every thing: in a word,

he had, if we may so speak, examined and judged those celebrated nations and men who only exist at present in the annals of the world. It was thus that he attained by degrees to the noblest title which a wise man can deserve, that of legislator of nations.

If he was animated by the importance of his subject, he was at the same time terrified by its extensiveness; he abandoned it, and returned to it again at several intervals. He felt, more than once, as he himself owns, his paternal hands fail him. At last, encouraged by his friends, he collected all his strength, and published *The Spirit of Laws*.

In this important work, M. D. Montesquieu, without insisting, after the example of those who preceded him, upon metaphysical discussions relative to the nature of man, supposed in an abstract state; without confining himself, like others, to consider certain people in certain particular relations or circumstances, takes a view of the inhabitants of the world in the actual state in which they are, and in all the relations which they can stand in to one another. The most part of other writers in this way are almost always either simple moralists, or simple lawyers, or even sometimes simple theologists. As for him, a citizen of all countries, and of all nations, he is less employed about what our duty requires of us, than about the means by which we can be obliged to fulfil it; about the metaphysical perfection of laws, than about that which human nature renders man capable of; about laws which have been made, than about those which ought to have been made; about the laws of a particular people, than about those of all nations. Thus, when comparing himself to those who have run before him in this noble and grand career, he might say, with Correggio when he had seen the works of his rivals, *And I also, am a painter.*

Filled and penetrated with his subject, the author of the Spirit of Laws comprehends in it so great a number of ma-

terials, and treats them with such brevity and depth, that an assiduous and studious reading of it can make us alone perceive the merit of this book. This will especially serve, we venture to say, to make that pretended want of method, with which some readers have accused M. de Montesquieu, disappear; an advantage which they ought not slightly to have accused him of having neglected in a philosophical subject, and in a work of twenty years. Real want of order ought to be distinguished from that which is only apparent. Disorder is when the analogy and connection of ideas are not observed; when conclusions are set up as principles, or precede them; when the reader, after innumerable windings, finds himself at the point whence he set o t Apparent disorder is when the author, putting in their true place the ideas which he makes use of, leaves it to the readers to supply the intermediate ones; and it is thus that M. de Montesquieu believed that he might and ought to make use of them in a book designed for men who thought, whose genius ought to supply voluntary and reasonable omissions.

The order which is perceivable in the grand divisions of the Spirit of the Laws takes place no less in the smaller details: we believe that, the more profoundly the work is studied, the more one will he convinced of it. Faithful to his general divisions, the author refers to each those objects which belong to it exclusively; and, with respect to those which, by different branches, belong to several subjects at once, he has placed, under each division, that branch which properly belongs to it. By this we easily perceive, and wi h-out confusion, the influence which the different parts of the subject have upon each other; as, in a tree or system of human knowledge well understood, we may perceive the mutual relation of sciences and arts. This comparison is by so much the more just, that it is the same thing with respect to a plan which we may form to ourselves for examining laws philosophically, as of that order which may be observed in a tree comprehending all the sciences: there will always

remain something arbitrary in it; and all that can be required of an author is, that he follow strictly, without deviating from it, that system which he has once formed to himself.

We may say of that obscurity, which is allowable in such a work, the same thing as want of order. What may be obscure for vulgar readers is not so for those whom the author had in his view. Besides, obscurity which is voluntary is not properly obscurity. M. de Montesquieu being sometimes obliged to present to us truths of great importance, the absolute and direct avowal of which might have shocked without doing any good, has had the prudence to cover them; and, by this innocent artifice, he has concealed them from those to whom they might have been hurtful, without making them lost to men of sagacity.

Among those works which have sometimes furnished him with assistance, and sometimes with clearer views for his own, we may perceive that he has especially profited from two historians who have thought the most, Tacitus and Plutarch: but, though a philosopher who has read these two authors might have dispensed with a great many others, he did not believe that he ought to neglect or disdain any thing in this way that could be of use to his subject. That reading which we must suppose necessary for the Spirit of Laws is immense; and the rational use which the author has made of such a prodigious multitude of materials will appear still more surprising, when it is known that he was almost entirely deprived of sight, and obliged to have recourse to eyes not his own; this prodigious reading contributes not only to the utility, but to the agreeableness, of the work. Without derogating from the majesty of his subject, M. de Montesquieu has known how to soften its austerity, and procure the reader some moments of repose, whether by facts which are singular and little known, or by delicate allusions, or by those strong and brilliant touches of the pencil, which paint, by one stroke, nations and men.

In a word, (for we will not here play the part of Homer's commentators,) there are, without doubt, faults in the Spirit of Laws, as there are in every work of genius whose author first dared to clear out for himself a new route. M. de Montesquieu has been amongst us, for the study of laws, what Descartes was for that of philosophy: he often instructs us, and is sometimes mistaken; and, even when he mistakes, he instructs those who know how to read him.—The last edition of his works demonstrates, by the corrections and additions which he has made, that, if he has now and then made a slip, he has been able to find it out, and to rise again. By this he will acquire, at least, a title to a new examination, in those places where he was not of the same opinion with his censurers: perhaps, indeed, what he imagined stood most in need of correction has entirely escaped them; so blind commonly is the inclination to do hurt.

But that which is within the reach of all the world is the Spirit of Laws; that which ought to render the author dear to all nations, that which would serve to cover far greater faults than are in it, is that spirit of patriotism which dictated it. The love of the public good, a desire of seeing men happy, discovers itself in it every where; and, had it no other merit but this, which is so rare and so valuable, it would be worthy, on this account alone, to be read by nations and kings. We already perceive, by happy experience, that the fruits of this work are not confined to useless sentiments in the minds of its readers. Though M. de Montesquieu survived the publication of the Spirit of Laws but a short while, he had the satisfaction in some measure to foresee those effects which it begins to produce amongst us; the natural love of Frenchmen for their country turned towards its true object; that taste for commerce, for agriculture, and for useful arts, which insensibly spreads itself in our nation; that general knowledge of the principles of government, which renders people more attached to that which they ought to love. Those who have so indecently attacked this work,

perhaps, owe more to it than they imagine. Ingratitude, besides, is the smallest reproach which we have to make them. It is not without regret, and without blushing for the age we live in, that we proceed to expose them; but this history is of too much consequence to the glory of M. de Montesquieu, and advantage to philosophy, to be passed over in silence. May that reproach, which at last covers his enemies, be of use to them!

Scarce had the Spirit of Laws appeared, but it was eagerly sought after on account of the reputation of its author: but, though M. de Montesquieu had written for the good of the people, he ought not to have had the vulgar for his judge. The depth of his subject was a necessary consequence of its importance. However, the strokes which were scattered up and down the work, and which would have been displaced if they had not arisen naturally from the subject, made too many people believe that it was written for them. People sought for an agreeable book, and they only found an useful one; the whole scheme and particular details of which they could not comprehend without some attention. The Spirit of Laws was treated with a deal of light wit: even the title of it was made a subject of pleasantry: in a word, one of the finest literary monuments which our nation ever produced was at first regarded by it with much indifference. It was requisite that the true judges should have time to read it: they very soon correct the errors of the multitude, always ready to change its opinion. That part of the public which teaches dictated to that which listens, to hear how it ought to think and speak; and the suffrages of men of abilities, joined to the echoes which repeated them, formed only one voice over all Europe.

It was then that the open and secret enemies of letters and philosophy (for there are of both kinds) united their darts against this work. Hence that multitude of pamphlets which were aimed against him from all parts, and which we shall

not draw out from that oblivion in which they have sunk. If those authors had not taken proper measures to be unknown to posterity, it might be believed that the Spirit of Laws was written amidst a nation of barbarians.

M. de Montesquieu easily despised the dark criticisms of those weak authors who (whether out of a jealousy which they had no title to have, or to satisfy the public ill-nature, which loves satire and contempt) outrageously attack what they cannot attain to; and, more odious on account of the ill which they want to do, than formidable for that which they actually do, do not succeed even in this kind of writing, the facility of which, as well as its object, renders equally mean. He placed works of this kind on the same level with those weekly newspapers of Europe, the encomiums of which have no authority, and their darts no effect; which indolent readers run over without giving credit to, and in which sovereigns are insulted without knowing it, or without deigning to revenge it. But he was not equally indifferent about those principles of irreligion which they accused him of having propagated in the Spirit of Laws. By despising such reproaches he would have believed that he deserved them, and the importance of the object made him shut his eyes at the real meanness of his adversaries. Those men, who really want zeal as much as they are eager to make it appear that they have it, afraid of that light which letters diffuse, not to the prejudice of religion, but to their own disadvantage, took different ways of attacking him; some, by a stratagem which was as puerile as pusillanimous, had written to himself; others, after having attacked him under the mask of anonymous writers, had afterwards fallen by the ears among themselves. M. de Montesquieu, though he was very jealous of confounding them with each other, did not think it proper to lose time, which was precious, in combating them one after another; he contented himself with making an example of him who had most signalized himself by his extravagance. It was the author of an anonymous and periodical paper, who

imagined that he had a title to succeed Pascal, because he has succeeded to his opinions; a panegyrist of works which nobody reads, and an apologist of miracles which the secular power put an end to whenever it wanted to do it; who calls the little interest, which people of letters take in his quarrels, impious and scandalous; and hath, by an address worthy of him, alienated from himself that part of the nation whose affections he ought chiefly to have endeavored to keep. The strokes of this formidable champion were worthy of those views which inspired him: he accused M. de Montesquieu of spinosism and deism (two imputations which are incompatible); of having followed the system of Pope (of which there is not a word in his works); of having quoted Plutarch, who is not a christian author; of not having spoken of original sin and of grace. In a word, he pretended that the Spirit of Laws was a production of the constitution *Unigenitus;* an idea which we may perhaps be suspected of fathering on the critic out of derision. Those who have known M. de Montesquieu, and who understand his work and that of Clement XI. may judge, by this accusation, of the rest.

The unsuccessfulness of this writer ought greatly to discourage him: he wanted to attack a wise man in that place which is most sensible to every good citizen; but he only procured him an addition of glory as a man of letters; the *Defence of the Spirit of Laws* appeared This work, on account of that moderation, that truth, that delicacy of ridicule which abound in it, ought to be regarded as a model in this way. M. de Montesquieu, charged by his adversary with atrocious imputations, might easily have rendered him odious; he did better, he made him ridiculous. If we are beholden to an aggressor for that good which he has done us without wanting to do it, we owe him eternal thanks for having procured us this master-piece. But what adds still more to the merit of this precious little piece is this, that the author, without thinking of it, has there drawn a picture of himself; those who knew him think they hear him; and

posterity will be convinced, when reading his *defence*, that his conversation was not inferior to his writings; an encomium which few great men have deserved.

Another circumstance gave him plainly the advantage in this dispute. The critic, who, as a proof of his attachment to religion, attacks its ministers, loudly accusing the clergy of France, and especially the faculty of Theology, of indifference for the cause of God, because they did not authentically proscribe so pernicious a work. The faculty had a title to despise the reproach of a nameless writer, but religion was in the question; a commendable delicacy made it resolve to examine the Spirit of Laws. Though it has been employed about it several years, it has not yet pronounced any thing; and, if some slight inadvertencies, which are almost inevitable in so vast a career, should have escaped M. de Montesquieu, the long and scrupulous attention, which they would have required from the most enlightened body of the church, might prove at least how excusable they are; but this body, full of prudence, will do nothing rashly in so important an affair. It knows the grounds of reason and of faith; it knows that the work of a man of letters ought not to be examined like that of a theologist; that the bad consequences, which odious interpretations may draw from a proposition, do not render the proposition blameable in itself; that besides we live in an unlucky age, in which the interests of religion have need of being delicately managed; and that it may do hurt to weak people to throw an ill-timed suspicion of incredulity upon geniuses of the first rank; that, in a word, in spite of this unjust accusation, M. de Montesquieu was always esteemed, visited, and well received, by the greatest and most respectable characters in the Church — Would he have preserved among men of worth that esteem which he enjoyed if they had regarded him as a dangerous writer?

While insects plagued him in his own country, England

erected a monument to his glory. In 1752, M. d'Assier, celebrated for the medals which he has struck in honor of several illustrious men, came from London to Paris to strike one of him. M. de la Tour, an artist of such superior talents, and so respectable for his disinterestedness and greatness of mind, had ardently desired to give a new lustre to his pencil, by transmitting to posterity the portrait of the author of the Spirit of Laws; he only wanted the satisfaction of painting him; and he deserved, like Apelles, that this honor should be reserved for him: but M. de Montesquieu, as sparing of M. de la Tour's time as he himself was free of it, constantly and politely refused his pressing solicitations. M. d'Assier at first bore with such difficulties. 'Do you believe,' said he at last to M. de Montesquieu, 'that there is not as much pride in refusing my offer as in accepting of it?' Overcome by his pleasantry, he permitted M. d'Assier to do whatever he would.

The author of the Spirit of Laws, in fine, was peaceably enjoying his glory, when he fell sick at the beginning of February: his health naturally delicate, began to decay for some time past, by the slow and almost infallible effect of deep study; by the uneasiness which they had endeavored to give him on account of his work; in a word, by that kind of life which he was obliged to lead at Paris, which he felt to be fatal to him. But the eagerness with which his company was sought after was too keen not to be sometimes indiscreet; they would, without perceiving it, enjoy him at the expence of himself. Scarce had the news of the danger which he was in spread abroad, but it became the object of the conversation and anxiety of the public. His house was never empty of persons of all ranks who came to enquire about his health, some out of real affection, others to have the appearance of it or to follow the crowd. His majesty, penetrated with the loss which his kingdom was about to sustain, enquired about him several times; a testimony of goodness and justice which does equal honor to the monarch and the subject. M.

de Montesquieu's end was not unworthy of his life. Oppressed with cruel pains, far from a family that was dear to him, and which had not the comfort of closing his eyes, surrounded by some friends and a great crowd of spectators, he preserved to his last moments a calmness and tranquillity of soul. In a word, after having performed with decency every duty, full of confidence in the Eternal Being whom he was about to be re-united with, he died with the tranquillity of a man of worth, who had never consecrated his talents but to the improvement of virtue and humanity. France and Europe lost him the 10th of Februury, 1755, aged sixty-six.

All the public news-papers published this event as a misfortune. We may apply to M. de Montesquieu what was formerly said of an illustrious Roman; that nobody, when told of his death, shewed any joy at it; that nobody even forgot him when he was no more. Foreigners were eager to demonstrate their regrets: my lord Chesterfield, whom it is enough to name, caused to be published in one of the public London papers an article to his honor, an article worthy of the one and of the other; it is the portrait of Anaxagoras drawn by Pericles.* The royal academy of sciences and belles lettres of Prussia, though it is not its custom to pronounce the *eloge* of foreign members, thought itself bound to do him an honor which it had not before done to any one but

* See this encomium in English, as we read it in the paper called the Evening Post. "On the 10th of this month, died at Paris, universally and sincerely regretted, Charles Secondat, baron of Montesquieu, and president a mortier of the parliament of Bordeaux. His virtues did honor to human nature, his writings justice. A friend to mankind, he asserted their undoubted and unalienable rights, with freedom, even in his own country, whose prejudices in matters of religion and government *(we must remember it is an Englishman who speaks)* he had long lamented, and endeavored (not without some success) to remove. He well knew and justly admired the happy constitution of this country, where fixed and known laws equally restrain monarchy from tyranny, and liberty from licentiousness. His works will illustrate his name, and survive him, as long as right reason, moral obligation, and the true Spirit of Laws, shall be understood, respected, and maintained."

the illustrious John Bernouilli M. de Maupertius, notwithstanding he was at that time indisposed, performed, himself, this last duty to his friend, and would not permit an office so dear and so melancholy to fall to the share of any other person. To so many honorable suffrages in favor of M. de Montesquieu, we believe we may add, without indiscretion, those praises which were given him, in presence of one of us, by that very monarch to whom this celebrated academy owes its lustre, a prince made to feel those losses which philosophy sustains, and at the same time to comfort her.

The seventeenth of February, the French academy, according to custom, performed a solemn service for him, at which, notwithstanding the rigor of the season, almost all the learned men of this body, who were not absent from Paris, thought it their duty to assist. They ought, at this melancholy ceremony, to have placed the Spirit of Laws upon his coffin, as heretofore they exposed, opposite to that of Raphael, his last picture of the transfiguration. This simple and affecting ornament would have been a fine funeral oration.

Hitherto we have only considered M. de Montesquieu as a writer and philosopher; it would be to rob him of the half of his glory, to pass over in silence his agreeable personal qualities.

He had, in company, a sweetness and gaiety of temper always the same. His conversation was spirited, agreeable, and instructive, by the great number of men and of nations whom he had known. It was, like his style, concise, full of wit and sallies, without gall, and without satire. Nobody told a story in a more lively manner, more readily, or with more grace and less affectation; he knew that the conclusion of an agreeable story is always the point in view, he therefore made dispatch to come at it, and produced the effect without having long promised it.

His frequent absence of mind only rendered him more amiable: he always awoke from it by some unexpected stroke which re-animated the languishing conversation; besides, these were never either frolicsome, shocking, or troublesome. The fire of his genius, the great number of ideas with which it was furnished, gave rise to them; but this never happened in the middle of an interesting or serious conversation; the desire of pleasing those, in whose company he was, made him attentive to them without affectation and without restraint.

The agreeableness of his conversation not only resembled his character and his genius, but even that kind of method which he observed in his study. Though capable of deep and long-continued meditation, he never exhausted his strength, he always left off application before he felt the least symptom of fatigue.*

He was sensible to glory, but he did not wish to attain it but by deserving it. He never endeavored to augment his own by those underhand practices, by those dark and shameful methods, which dishonor the character of the man without adding to that of the author.

Worthy of every distinction and of every reward, he asked nothing, and he was not surprised that he was forgot; but he has adventured, even in delicate circumstances, to protect at court men of letters, who were persecuted, celebrated, and unfortunate, and has obtained favors for them.

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* The author of the anonymous and periodical paper, which we mentioned above, pretends to find a manifest contradiction between what we say here and that which we had said before, that M. de Montesquieu's health was impaired by the slow and almost infallible effect of deep study. But why, when he was comparing the two places, has he suppressed these words, *slow and almost infallible*, which he had under his eyes? It is evidently because he perceived, that an effect which is slow, is not a bit less real for not being felt immediately; and that, consequently, these words destroy that appearance of contradiction which he pretends to point out. Such is the fidelity of this author in trifles, and for a stronger reason in more serious matters.

Though he lived with the great, whether out of necessity, or propriety, or taste, their company was not necessary to his happiness. He retired whenever he could to his estate in the country; he there again with joy met his philosophy, his books, and his repose. Surrounded, at his leisure hours, with country people, after having studied man, in the commerce of the world, and in the history of nations, he studied him also in those simple people whom nature alone had instructed, and he could from them learn something: he conversed cheerfully with them; he endeavored, like Socrates, to find out their genius; he appeared as happy, when conversing with them, as in the most brilliant assemblies, especially when he made up their differences, and comforted them under their distress by his beneficence.

Nothing does greater honor to his memory than the method in which he lived, which some people have pretended to blame as extravagant, in a proud and avaricious age, extremely unfit to find out, and still less to feel, the real benevolent motives of it.

M. de Montesquieu would neither make encroachments upon the fortune of his family, by those supplies which he gave the unfortunate, nor by those considerable expences which his long tour of travelling, the weakness of his sight, and the printing of his works, had exposed him to. He transmitted to his children, without diminution or augmentation, the estate which he received from his ancestors; he added nothing to it but the glory of his name, and the example of his life. He had married, in 1715, dame Jane de Lartigue, daughter of Peter de Lartigue, Lieutenant-Colonel of the regiment of Molevrier: he had two daughters and one son by her, who, by his character, his morals, and his works, has shewn himself worthy of such a father.

Those who love truth and their country will not be displeased to find some of his maxims here. He thought

That every part of the state ought to be equally subject to the laws; but that the privileges of every part of the state ought to be respected when their effects have nothing contrary to that natural right which obliges every citizen equally to concur to the public good: that ancient possessions were in this kind the first of titles, and the most inviolable of rights, which it was always unjust, and sometimes dangerous to want to shake.

That magistrates, in all circumstances, and notwithstanding whatever advantage it might be to their own body, ought never to be any thing but magistrates, without partiality and without passion, like the laws which absolve and punish without love and hatred.

In a word, he said, upon occasion of those ecclesiastical disputes which have so much employed the Greek Emperors and christians, that theological disputes, when they are not confined to the schools, infallibly dishonor a nation in the eyes of its neighbors: in fact, the contempt, in which wise men hold those quarrels, does not vindicate the character of their country; because, sages making every where the least noise, and being the smallest number, it is never from them that the nation is judged of.

The importance of those works, which we have had occasion to mention in this panegyric, has made us pass over in silence less considerable ones, which served as a relaxation to our author, and which, in any other person, would have merited an encomium. The most remarkable of them is the Temple of Gnidus, which was very soon published after the Persian Letters. M. de Montesquieu, after having been Horace, Theophrastus, and Lucian, in those, was an Ovid and Anacreon in this new essay. It is no more the despotic love of the East which he proposes to paint, it is the delicacy and simplicity of pastoral love, such as it is in an unexperienced heart which the commerce of the world has not yet

corrupted. The author, fearing, perhaps, that a picture so opposite to our manners should appear too languid and uniform, has endeavored to animate it by the most agreeable images. He transports the reader into inchanted scenes, the view of which, to say the truth, little interests the lover in his happiest moments, but the description of which still flatters the imagination, when the passions are gratified. Inspired by his subject, he hath adorned his prose with that animated, figurative, and poetic style, which the romance of Telemachus gave the first example of amongst us. We do not know why some censurers of the Temple of Gnidus have said upon this occasion, that it ought to have been written in verse. The poetic style, if we understand, as we ought by this word, a style full of warmth and images, does not stand in need of the uniform march and cadency of versification to be agreeable; but, if we only make this style to consist in a diction loaded with needless epithets, in the cold and trivial descriptions of the wings and quiver of love, and of such objects, versification will add nothing to the merit of these beaten ornaments; in vain will we look for the life and spirit of it. However this be, the Temple of Gnidus being a sort of poem in prose, it belongs to our celebrated writers to determine the rank which it ought to hold: it is worthy of such judges.

We believe, at least, the descriptions in this work may with success stand one of the principal tests of poetic descriptions, that of being represented on canvass. But what we ought chiefly to observe in the Temple of Gnidus is, that Anacreon himself is always the observer and the philosopher there. In the fourth canto the author appears to describe the manners of the Cyberites, and it may easily be perceived that these are our own manners. The preface especially bears the mark of the author of the Persian Letters. When he represents the Temple of Gnidus as a translation from a Greek manuscript, a piece of wit which has been so much disfigured since by bad imitators, he takes occasion to paint

by one stroke of his pen the folly of critics and the pedantry of translators. He concludes with these words, which deserve to be repeated: 'If serious people require some other work of me of a less frivolous nature, I can easily satisfy them; I have been laboring thirty years at a work of twelve pages, which will contain all that we know of metaphysics, politics, and morality; and all that the greatest authors have forgot in the volumes which they have published on these sciences.'

JURIDICAL SELECTIONS.

JUDGMENT OF THE SUPREME COURT OF NEW-ORLEANS, *ON MARTIAL LAW, & ON A SUSPENSION LAW.*

DELIVERED BY JUDGE MARTIN.

A motion that the court might proceed in this case, has been resisted on two grounds—

1*st*. That the city and its environs were by general orders of the officer commanding the military district, put, on the 15th of December last, *under strict Martial Law*.

2*d*. That by the § 3, of an act of Assembly, approved on the 18th of December last, all proceedings in any civil case are suspended.

I. At the close of the argument, on Monday last, we thought it our duty, lest the smallest delay should countenance the idea, that this court entertain any doubt on the first ground, instantly to declare *viva voce* (although the practice is to deliver our opinions in writing) that the exercise of an authority vested by law in this court, could not be suspended by any man.

In any other state but this, in the population of which are many individuals, who, not being perfectly acquainted with their rights, may easily be imposed on, it could not be expected that the Judges of this court should, in complying with the constitutional injunction, *in all cases to adduce the reasons on which their judgment is founded*, take up much time to shew that this court is bound utterly to disregard what is thus called *martial law;* if any thing be meant thereby, but the strict enforcing of the rules and articles for the government of the army of the United States, established by Congress, or any act of that body relating to military matters, on all individuals belonging to the army or militia in the service of the United States. Yet we are told by this proclamation of martial law, the officer who issued it has conferred on himself, over all his fellow-citizens within the space which he has described, a supreme and unlimited power, which being incompatible with the exercise of the functions of civil magistrates, necessarily suspends them.

This bold and novel assertion is said to be supported by the 9th section of the first article of the constitution of the United States, in which are detailed the limitations of the power of the Legislature of the Union. It is there provided that *the privilege of the writ of habeas corpus shall not be suspended, unless when, in cases of invasion, or rebellion, the public safety may require it.* We are told that the commander of the military district is the person who is to suspend the writ, and is to do so whenever, *in his judgment*, the public safety appears to require it—that, as he may thus paralyze the arm of the justice of his country, in the most important case, the protection of the personal liberty of the citizen, it follows, that, as he who can do the *more* can do the *less*, he can also suspend all other functions of the civil magistrate, which he does by his proclamation of martial law.

This mode of reasoning varies, *toto cælo*, from the decision

of the Supreme Court of the United States, in the case of Swartwout and Bollman, arrested in this city in 1806 by General Wilkinson.

The court then declared, that the constitution had exclusively vested in Congrees the right of suspending the privilege of the writ of habeas corpus, and that that body was the sole judge of the necessity that called for the suspension. "If, at any time," said the Chief Justice, "the public safety shall require the suspension of the powers vested in the courts of the United States by this act (the habeas corpus act) *it is for the Legislature to say so.* This question depends on political considerations, on which the Legislature is to decide. Till the legislative will be expressed, this court can only see its duties, and must obey the law." 4 *Cranch.* 101.

The high *authority* of this decision seems, however, to be disregarded; and a contrary opinion is said to have been lately acted upon, to the distress and terror of the good people of this state. It is therefore meet to dispel the clouds which designing men endeavor to cast on this article of the constitution, that the people should know that their rights, thus secured, are neither doubtful or insecure, and supported on the clearest *principles* of our laws.

Approaching, therefore, the question, as if I were without the above conclusive authority, I find it provided by the constitution of this state, that "no power of suspending the laws of this state shall be exercised unless by the Legislature, or under its authority." The proclamation of martial law, therefore, if intended to suspend the functions of this court or its members, is an attempt to exercise powers thus exclusively vested in the Legislature. I therefore cannot hesitate in saying, that it is, in this respect, null and void. If, however, there be aught in the constitution, or laws of the United States, that really authorises the commanding officer of a military district to suspend the laws of this state,

as that constitution and these laws are paramount to those of the state, they must regulate the decision of this court.

This leads me to the examination of the power of suspending the writ of habeas corpus, and that which it is said to include, of proclaiming martial law, as noticed in the constitution of the United States. As in the whole article cited, no mention is made of the power of any other branch of government but the legislative, it cannot be said that any of the limitations which it contains extend to any of the other branches. *Iniquum est perimi de pacto id de quo cogitatum non est.* If, therefore, this suspending power exists in the Executive (under whose authority it has been endeavored to exercise it) it exists without any limitation—then the President possesses, without limitation, a power which the Legislature cannot exercise, without a limitation—thus he possesses a greater power *alone* than the House of Representatives, the Senate and himself *jointly*.

Again—the power of repealing a law and that of suspending it, (which is a partial repeal) is a legislative power. For *eodem modo, quod quid constituitur eodem modo destruitur.* And every legislative power that may be exercised under the constitution of the United States, is exclusively vested in Congress: all others, are retained by the people of the several States.

In England, at the time of the invasion of the Pretender, assisted by the forces of hostile nations, the habeas corpus act was indeed suspended, but the Executive did not thus of itself stretch its own authority,—the precaution was deliberated upon, and taken by the representatives of the people. *De Lolme* 409. And there the power is safely lodged without the danger of its being abused. Parliament may repeal the law on which the safety of the people depends; but it is not their own caprices and arbitrary humors, but the caprices and arbitrary humors of other men which they will have

gratified, when they shall have thus overthrown the columns of liberty. *Id.* 275.

If it be said that the laws of war, being the laws of the United States, authorise the proclamation of martial law, I answer that in peace or in war no law can be enacted but by the legislative power. In England, from whence the American jurist derives his principles in this respect, " martial law cannot be used without the authority of Parliament." 5 *Comyns* 229. The authority of the monarch himself is insufficient. In the case of Grants *vs.* Sir C. Gould, 2 *Hen. Bl.* 69, which was on a prohibition (applied for in the court of common pleas) to the defendant, as Judge Advocate of a Court Martial, to prevent the execution of the sentence of that military tribunal, the counsel, who resisted the motion, said it was not to be disputed that martial law can only be exercised in England so far as it is authorised by the mutiny act and the articles of war, all which are established by Parliament, or its authority ; and the court declared it totally inaccurate to state any other martial law, as having any place whatever within the realm of England. In that country, and in these states, by martial law is understood the jurisprudence of these cases, which are decided by Military Judges or Courts Martial. When martial law is established, and prevails in any country, said Lord Loughborough, in the case cited, it is totally of a different nature from that which is inaccurately called martial law, (because the decisions are by a Court Martial), but which bears no affinity to that which was formerly attempted to be exercised in this kingdom, *which was contrary to the constitution*, and which has been for a century totally exploded. When martial law prevails, continues the Judge, the authority under which it is exercised claims jurisdiction over all *military* persons in *all* circumstances : even their *aebts* are subject to enquiry by military authority : every species of offence committed by any person *who appertains to the army*, is tried, not by a

civil judicature, but by the judicature of the corps or regiment to which he belongs.

This is martial law, as defined by Hale and Blackstone, and which the court declared not to exist in England. Yet it is confided to *military* persons—here it is contended, and the court must admit, if we sustain the objection, that it extends to *all* persons—that it dissolves for a while the government of the state.

Yet, according to our laws, all military courts are under a constant subordination to the ordinary courts of law. Officers who have abused their powers, though only in regard to their own soldiers, are liable to prosecution in a court of law and compelled to make satisfaction. Even any flagrant abuse of authority by members of a court martial, when sitting to judge their own people, and determine in cases entirely of a military kind, makes them liable to the animadversion of the civil Judge. *De Lolme*, 447. *Jacob's Law Dict. verbo court martial.* How preposterous then the idea that a military commander may, by his own authority, destroy the tribunal established by law as the asylum for those oppressed by military despotism.

II. It is further contended, that the 3d section of the act of Assembly, approved on the 18th December last, suspended all proceedings in civil cases, until the 1st of May next; but it is answered, that this section is unconstitutional and void, inasmuch as it violates the constitution of the United States, which provides, that no state shall pass any law *impairing* the obligations of contracts, this law delaying for upwards of four months the recovery of sums due on contracts.

It is no longer a question in the United States, whether unconstitutional acts of the Legislature be of any force and effect. This State is among those, the constitution of which contains an express provision on this subject: "All laws

contrary to this constitution shall be null and void;" and this court, in the case of the syndics of Brooks *vs.* Weyman, determined it was their province to enquire into and pronounce upon the constitutionality of any law invoked before them.

If, therefore, the section under consideration, really impairs the obligation of contracts, we must declare it null and void.

The obligation of contracts consists in the necessity under which a man finds himself to do, or refrain from doing, something. This obligation exists generally both *in foro legis* and *in foro conscientiæ*, though it does at times exist in one of these only. It is certainly of the first, that *in foro legis*, which the framers of the constitution spoke, when they prohibited the passage of any law impairing the obligation of contracts. Now, a law absolutely recalling the power which the creditor enjoys of compelling his debtor, *in foro legis*, to perform the obligation of his contract, would be a law destroying the obligation of the contract *in foro legis*, since a right without a legal remedy, ceases to be a legal right. It would impair the obligation of the contract by destroying its legal obligation; in other words, by reducing an obligation both in *foro legis* and *in foro conscientia* to an obligation *in foro conscientiæ* only; a legal and moral right to a moral right only. The remedy *in foro legis* constituting the legal right of the creditor, constitutes also its correlative, the legal duty or obligation of the debtor; and a law which reduces a legal to a moral obligation is one which *in foro legis* destroys the obligation. It appears therefore to me incorrect to say that the Legislature may effectually do, as to the *remedy* or effect of the obligation, that which it cannot do as to the right; and, I conclude, that a law destroying or impairing the remedy, is as unconstitutional as one affecting the right in the same manner; for *in foro legis* the effects of both laws must be the same.

Likewise a law procrastinating the remedy, generally speaking, destroys part of the right. He pays *less*, who pays *later*—*Minus solvit, qui serius solvit.* Neither is the procrastination properly compensated by the allowance of interest in the mean while. To many men, in many circumstances, there is a wide difference between one hundred dollars payable to day and one hundred and six dollars payable in a twelve month, whatever may be the certainty that no disappointment will occur; and, in many cases, the delay is likely to be productive of considerable danger to the solvability of the debtor. Any indulgence, therefore, in point of time afforded by the Legislature, to the debtor, is a correlative injury to the creditor in the same *degree*, though of a different nature, as a correspondent indulgence by a proportionate reduction of the debt.

That such were the impressions of the framers of the constitution, will appear, if, in expounding that instrument, we follow the rules laid down for the exposition of statutes—if we consider the old law, the mischief, and the remedy.

The charter of our federal rights was framed not many years after the termination of the war which secured our independence. The disasters attending the arduous conflict, had disabled many an honest individual from punctually discharging his obligations; and the Legislatures of some of the States, more attentive to afford immediate and temporary relief, than a more remote and lasting one, by a sacred regard for good faith, and the consequent preservation of credit, passed laws, meliorating the condition of debtors to the great *injury* and *ruin* of creditors. In one State, an emission of paper money, for the redemption of which, no day was fixed, nor any fund provided, was made a legal tender. In other words, an obligation to pay gold and silver, was impaired by being reduced to an obligation to pay irredeemable paper. Elsewhere a similar obligation was impaired by being reduced to an obligation to deliver a tract

of pine barren land, or an instalment law was passed, and an obligation to pay to-day was impaired by being reduced to an obligation to pay at several periods at the distance of intervening years—Such was the *old law*. The consequent diminution of the fortunes of several individuals, the total ruin of others, and the indispensable concomitant, the destruction of credit, produced a stagnation of business, which considerably affected public and private property—Such was the mischief.

The federal compact provided, that the Legislature of no State should retain the power of making any thing but gold and silver a tender in the discharge of debts, in order to avert in future the mischiefs resulting from laws impairing the obligation of a contract to pay gold and silver by reducing it to an obligation to pay *paper*, *pine barren lands*, or indeed, any thing, but gold and silver. Yet the remedy was not commensurate with the evil; the healing process was therefore continued, in order to prevent the passage of laws impairing the obligation of a contract to pay on a distant day or days—or indeed any attempt at a legislative interference between parties to a contract by favoring either party, to the injury of the other; and it was provided, that no State should pass any law impairing the obligation of contracts—if the restriction from making any thing but gold and silver a tender in the payment of debts, had not preceded that from passing any laws impairing the obligation of contracts, there might be some, though very little ground to say that the latter clause would have been satisfied by restraining the passage of laws authorising the payment of one thing instead of another.

I therefore find no difficulty in concluding that an act of a State Legislature, the obvious object of which is to relieve debtors by postponing the recovery, and consequently the payment of debts, *impairs* the obligation of contracts, and, as such, is unconstitutional; and the court is bound to dis-

regard it, whatever may be the hard necessity which, in the opinion of those who exercise the legislative powers of the State, appeared to require that they should come to the aid of their suffering fellow-citizens. *Fiat justitia, ruat Cælum.*

The people of the United States, assembled in federal convention, have decreed, that no State Legislature should exercise the right of thus stepping in between the parties to a contract, and the Judges are bound by their oath of office to prevent the violation of the constitutional injunction.

It does not, however, necessarily follow, that an act called for by other circumstances, than the apparent necessity of relieving debtors, one of the consequences of which is nevertheless to work some delay in the prosecution of suits, and consequently to retard the recovery and payment of debts, must always be declared unconstitutional.

In making a contract, each party must know that his legal remedy must depend on the laws of the country in which he may institute his suit. That the *lex loci* as to his remedy, even in the States that compose the federal union, is susceptible of *juridical improvement;* that the number of courts of original and appellate jurisdiction, the nature and extent of the respective jurisdiction of these, the number, time and duration of their sessions must, from time to time, especially in new and growing settlements, be regulated by the Legislature according to the wants and exigencies of the country.

If, for example, the sessions of the district courts, which, in Louisiana, are now held in each parish three times a year, were found too frequent, too inconvenient to jurors, witnesses and suitors, and too expensive to the State, no one can say that the Legislature could not enact that the session of these tribunals should be semi-annual only.

In most of the parish courts of this State, the trial by jury is not in use—Should the people of these parishes solicit the

introduction of a jury in these courts, would the constitution be violated by this improvement in our judicial system? In Pennsylvania and Louisiana, courts of equity, as contradistinguished from courts of law, are unknown. Should the people of these States, noticing the advantages resulting from the division of law and equity proceedings, in the neighboring States, see fit to try the experiment, is there aught in the constitution of the United States that forbids their representatives in General Assembly to accede to their wishes? Yet, semi-annual sessions of our district courts, the introduction of the trial by jury, and the institution of courts of equity, must lengthen the period between the inception of many a suit and its final determination, and, consequently, delay some plaintiffs. But as the laws introducing such alterations in the judicial system, would be productive of advantages in which both parties to the contract might occasionally participate, they would not, it is presumed, be considered as *impairing* the obligation of contracts.

Again—in time of war, domestic commotion or epidemy, circumstances may imperiously demand, for a while, even a total suspension of judicial proceedings. A suspension which, in many cases, may be peculiarly beneficial to a plaintiff who might be nonsuited if the court in which he may have instituted his suit were to proceed while his duty, and that of his agents and the interest of the State, called him to a distant part of the country. It would be dangerous in such times, and often impossible, to insist on the regular attendance of the officers of the court, of jurors, witnesses and parties. No one would, in such cases, doubt the ability, nay, the obligation, of the court, to adjourn to the probable period of returning tranquillity. Can it be said that the interposition of the Legislature, if it happened to be in session, declaring the necessity of such an adjournment, and with a view to that order and regularity, which uniformity produces, fixing a day on which juridical business will be resumed,

throughout the State, would be an act *impairing* the obligation of contracts.

Even if that day was fixed by half a dozen of weeks beyond that on which any of the courts of the State might conceive they might safely re-enter on the execution of their duties, would not such a court recognize some advantage in their forbearance from pressing business to the injury of such suitors, who, entertaining a different opinion, and having no previous knowledge of the determination of the court, might stay aloof, in the fair persuasion that the unhappy period was not yet arrived ?

I presume that in any time, obnoxious to the due administration of justice, it is the duty, and within the power of the Legislature, to pass laws to avert or diminish the consequences of the general calamity ; and a law called for by such circumstances, and fairly intended to meet the exigency of the day, could not be properly classed among those which impair the obligation of contracts, though one of its consequences would be some delay in the recovery of debts.

Testing, therefore, the section under consideration by the principles which I have thus endeavored to lay down, I find it stated in the preamble that " the present crisis will oblige a great number of citizens to take up arms in defence of the State, and compel them to leave their private affairs in a state of abandonment, which may expose them to great distress, if the Legislature should not, by measures adopted to the circumstances, come to their relief." The 3d section next provides, that " no civil suit or action shall be commenced or prosecuted before any court of record, or any tribunal of the state till the first of May next."

In fact, at the time the act was approved the enemy was fast approaching, and five days after made his appearance within five miles of the city of New Orleans. Shortly after, the whole militia of the State was called *en masse* into ser-

vice, and they were not discharged till the middle of March. During the most of this period the fate of the contest was doubtful.

It was, therefore, advantageous to all parties, that the administration of justice should be confined to cautionary steps—which were not suspended. This was beneficial to all parties. Plaintiffs were relieved from attendance upon the courts, and the same indulgence was granted to defendants.

The object of this section of the act was therefore to prevent the ill administration of justice which must have been the consequence of keeping the courts open, while the presence of the enemy disallowed any other attempt but that of expelling him. Another object was to facilitate to every member and officer of the court, and to every individual in the community, the means of rendering himself as useful as he could in repelling the invading foe. From the moment the danger subsided, I mean from the discharge of the militia then called out *en masse*, about six weeks will elapse, a time barely sufficient for the return home of our fellow-citizens who dwell at the greatest distance from the spot which has been the theatre of the war. Violent diseases of the political, as well as of the natural body, are followed by a convalescence, during which, even ordinary exertions may be hurtful. It does not appear to me that the suspension was for a longer time than the courts themselves would have taken, if they had been left to the exercise of their own discretion, unaided by a legislative provision. I am not, therefore, prepared to say that the interference of the Legislature was any thing else than the exercise of legitimate authority. The suspension of civil proceedings under some authority or other, for a short time, was a measure imperiously called for: it has been beneficial to plaintiffs as well as to defendants in several cases, and although it may create a little delay in the collection of debts, I do not find myself led by duty or inclination

to consider the act as impairing the obligation of contracts, and I think it the duty of the court to comply with the object, by enforcing the law.

JUDGE DUVAL's CHARGE

In the case of Commodore MURRAY vs. *M'*LANE, *Collector of the port of Wilmington, Delaware.*

The declaration in this case is drawn with great care, and exhibits a full statement of the plaintiff's case. It contains two counts. The first count charges the defendant with having falsely, maliciously, or without cause, instituted a suit against the plaintiff, demanding heavy bail, whereby he was arrested and imprisoned. The second count charges, that the suit was instituted maliciously and without cause, and that excessive bail to the amount of 1,200,000 dollars was demanded *in a case where he had no right to demand bail*, in consequence of which he was arrested and imprisoned.

This action, in its nature, is peculiar and delicate. Formerly, it was used as a remedy for malicious prosecutions only. It was, afterwards, adopted as a remedy where a civil suit had been maliciously and without cause instituted against the party.

The court has been applied to by the counsel for the defendant to instruct the jury upon the law arising in the case.

The jury must have observed that the counsel engaged in this cause, have not materially differed as to the proof which the plaintiff must necessarily produce in order to sustain his case: *That the original suit was instituted maliciously, and without reasonable or probable cause.*

The court consider the law upon this subject as settled. This species of action is not favored in law. It is incumbent

on the plaintiff to prove that the suit, by the defendant, was instituted with malice, express or implied, and without probable cause. Without probable cause, malice may be implied according to the circumstances of the case: but from the most express malice, want of probable cause cannot be implied. Hence, to sustain this suit, the plaintiff must prove malice express or implied, that there was a writ without probable cause.

Whether malice existed or not, is a matter of fact for the jury to decide, taking into consideration all the circumstances of the case.

The question of probable cause, is a mixed proposition of law and fact. Whether the circumstances alleged to shew it probable, or not probable, are true, and existed, is a matter of fact; but whether supposing them true, they amount to a probable cause is a question of law to be decided by the court.

Whether the bail required in this case was excessive or not, depended, in a great measure, upon the law of the State of Delaware, and the practice of the courts under those laws. In Maryland, in an action of this kind, no man could be held to bail for the trifling sum of fifty dollars without an affidavit. In Delaware, I understand the practice is proved to be different, and that a man may be required, without affidavit, to give bail to any amount, according to the value of the thing in contest, in the first instance. He may afterwards be exonerated on application to a Judge or Justice for a rule on the plaintiff to shew cause why he may not be discharged on common bail; and it also appears that the practice is, to require bail in double the amount of the value of the ship in dispute. In the case under consideration, it does not appear to the court that 1,200,000 dollars was more than double the value of the Superior and her cargo.

The question of probable cause has been considered as involving the legality or illegality of the seizure, and possession of the Superior by the plaintiff—and by the defendant. Here it is necessary to recapitulate the evidence in the case. The principle facts appear to be these: On the 24th of August, 1812, Joseph Grubb wrote a letter to the Collector, informing him that the Superior was in the bay of Delaware, having on board a cargo of goods of the growth, produce and manufacture of Great-Britain, and he states that he gave this information in order that he may receive the proportion of any penalty or forfeiture to which he might be entitled by reason of his giving this information. That Thomas Little boarded the Superior near the Capes of Delaware, by instruction from the principal owners and consignees, and obtained a copy of the manifest to be given to the Collector.

That on the 25th of August one of the Gun Boats and the Revenue Cutter, were proceeding down the bay, the Gun Boat being ahead, at 7 o'clock in the morning the Superior was boarded near Reedy Island, by —— Smith, an officer of the Gun Boat, pursuant to the orders of Commodore Murray, commander of the flotilla, then lying in Delaware Bay, by whom she was ordered to Newcastle. About 11 o'clock of the same day she was boarded by Captain Sawyer of the Revenue Cutter, who demanded the ship's papers, and they were delivered to him by the master of the vessel. She was ordered by Capt. Sawyer to the mouth of Christiana Creek. A contest arose between the officer of the Gun Boat and the officer of the Revenue Cutter, as to the destination of the vessel, and both remaining on board she ascended up the river to Newcastle where the flotilla was stationed. Previous to her arrival off Newcastle, Samuel Spackman, the owner, declared his intention to the Collector to order the Superior to Wilmington, and the Collector advised the Surveyor at Newcastle, and the Captain of the Cutter, of this circumstance. At Newcastle, orders were given that she should be fastened to the pier, but this was prevented by an

officer of the flotilla, who, aided by a number of his men, who were armed, forcibly carried her up the river to Philadelphia, the officer of the Revenue Cutter continuing on board. In this place it may not be improper to remark, that the force used was in the absence of Comm. Murray. If he had been present, in all probability it would not have taken place — Under these circumstances, the Collector, consulting the District Attorney, was advised to take out a writ of replevin to recover the possession of the vessel, but as she had been carried out of the District the writ could not be served. The Attorney then, in the absence of the Collector, ordered an action on the case, and directed the writ to be endorsed per bail, to the amount of 1,200,000 dollars, double the supposed amount of the vessel and cargo. The writ was served on Commodore Murray, and for want of bail, he was committed to gaol by the Marshal. This proceeding is the ground of the present action.

It is made by law the duty of the Collector of the Revenue to board, or cause to be boarded, all vessels arriving from foreign parts, within the limits of the United States, or within four leagues of the coast, if bound to the United States, for the purposes specified in the law, and it is the duty of the person on board to remain there until the vessel shall arrive at the port or place of destination.

Before the war a collision of this sort could not have happened. The authority of the Collector was complete and exclusive. How far the existence of war authorised the commander of the armed vessels of the United States to capture merchant vessels, belonging to citizens, which had arrived within the waters and jurisdiction of the United States, for a supposed violation of the non-importation act, is a question on which the opinion of the court is required.

The only question of difficulty is, whether the boarding by the officer of the Gun Boat, in the manner pursued, amounts

to a capture as prize of war, exclusive of the boarding by the Revenue officer, who demanded and obtained the ship's papers. No authorities having been cited on either side, we must decide the case as it is now before us.

There is no legal restraint on the officers of the navy to prevent them boarding a merchant vessel belonging to a citizen in the waters of the United States. Boarding for the purpose of examination is a legal act. Under the circumstances which have been stated, the court is of opinion, that after the Superior was boarded by the commander of the Revenue Cutter, who obtained possession of the ship's papers, he was, in construction of the law, in possession of the vessel, and that she ought to have been delivered up by the officer of the flotilla; and that the carrying her out of the District by force was wrongful on the part of that officer, acting under the authority, as he conceived, of Commodore Murray.

It has been contended on the part of the plaintiff, and authorities have been produced to prove, that in time of war, all trading with the enemy is unlawful, and that the goods of an ally or even of a citizen found trading with an enemy are lawful prizes of war, and confiscable as such. There can be no doubt that the law is so. If the Superior had been captured on the high seas trading with the enemy, or in violation of the laws of the United States, the vessel and cargo without doubt would have been prize of war. Such, I conceive, was the case of the Sally, condemned by the decision of the United States. I do not recollect particularly the facts in that case, but I have no doubt she was captured on the high seas, because she was captured by a private armed vessel whose right to capture is confined to the high seas.—The case of the Nelly referred to in the opinion, was a capture on the high seas. The reference, in the opinion, to the fourth, sixth and fourteenth sections of the act of June 26, 1812, seems to imply a capture at sea. The words of the

sixth section are, "And in the case of all captured vessels, goods and effects which *shall be brought within the jurisdiction of the United States*, the District Courts of the United States shall have exclusive cognizance thereof, as in civil causes of admiralty and maritime jurisdiction," &c.

In the case of the Sally it was contended by the Attorney General, on the part of the United States, that as soon as she had on board her cargo with intent that the same should be landed in the United States, they became forfeited, and that the forfeiture was complete and immediately attached, but the court was of a different opinion, and that she was lawful prize; there was no interesting claim in that case on the part of the Revenue officer.

Seizures of vessels within the waters of the United States, for violation of the non-intercourse act, are considered as properly belonging to the Revenue officers. This appears by the instructions of the Executive Department, to have been the opinion of the government: and although the instructions were not received in time by Comm. Murray to prevent this contest, yet this clearly shews the construction put upon the law by the Navy Department.

After seizure by the Collector, the vessel and cargo are considered to be at the risk, and in case of loss by the neglect or omission of the Collector, he is responsible to the owner. Hence the court is of opinion, that, admitting the facts to be truly stated, there was probable causes for the suit, which was the ground of this action. It would be rigorous in the extreme, to say that there was not probable cause for the original suit when the Attorney for the District, whom the Collector was bound to consult, advised and directed the measure. And if it be admitted that the District Attorney was mistaken, it cannot alter the case as it respects probable cause, because if the case was of so doubtful a nature as that eminent counsel was mistaken, it affords a strong presumption that there was probable cause.

The court are therefore of opinion, that there was a probable cause of action, and to the jury the case is now submitted.

After such a decided charge, the jury retired for about ten minutes, when they returned with a verdict in favor of the defendant, Col. M'Lean.

JUDGE TOULMIN's OPINION,

In the case of the United States v. *Sch. Active and Cargo, in the Court of Admiralty of Mississippi Territory, on the question, whether the army acquires a right to property captured in war.*

This is the case of a vessel and cargo, belonging to the enemy, taken in sight of the fort at Mobile Point, by the troops stationed at that place under the command of Maj. William Lawrence. It appears from the testimony of two of the persons who boarded the vessel, that a boat with six men was sent out by the commanding officer to examine a vessel, which, on approaching, they found to be British: that after being fired upon by the fort, she was boarded and taken without opposition, at the distance of about a mile, or perhaps more, as one of them says—or about two miles, as the other thinks: that she was under British colors—that the persons on board acknowledged themselves to be British subjects, and said they were detached from the Sea Horse to bring the schr. Active and cargo (consisting of flour captured at Alexandria) to Pensacola; and that the crew, consisting of six men, were armed with muskets, cutlasses and pistols. The log-book shews her to be British. The libel prays the condemnation of the vessel and cargo as good and lawful prize to the United States. A plea, however, is filed by Lewis Judson (in the character of consignee and agent for the captors) to the jurisdiction of the court, on the ground

that as this court has jurisdiction only in cases in which the United States are parties, it cannot legally entertain a suit in which the private captors (as it is alleged) are the only parties who have a right to claim the captured property. The said plea farther alleges that the "schooner Active and cargo were captured by Wm. Lawrence and others, on the high seas, and not in the enemy's forts, camps, or barracks, and, therefore, by the usages of the laws of nations, and the laws of war, as enemy's property, become forfeited to the said private captors."

No question has been made as to the *regularity** of the plea, nor as to the legitimacy of the conclusion, that the government is in no sense to be regarded as a party, if the proceeds of a capture are suffered to go to the troops engaged in making the capture; but the whole has been liberally left by the Attorney† prosecuting on behalf of the United States, to depend on the simple question whether the troops of the United States thus making a prize, are entitled by law to the benefit of it? The general belief that they are so entitled, the want of a knowledge of correspondent cases, and the little attention which, in this part of the country, we have had occasion to give to enquiries of this nature, have apparently created doubts even in the mind of the Attorney acting for the United States, and have rendered both parties desirous that the question should be judicially settled. The most satisfactory mode, probably, of coming to a conclusion on this subject, will be to have recourse to general principles.

"1. What is war? It is a contest (says Bynkershock) carried on between independent persons for the sake of asserting their rights." Where society does not exist—where

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* See Bee's Reports, p. 9.

† Mr. Haines.

there is no such institution as that which we call *government*, there individuals, being strictly independent persons, may carry on war against each other. But whenever men are formed into a social body, war cannot exist between individuals. The use of force among them is not war, but a trespass, cognizable by the municipal law. (Bink. on the law of war, p. 128.) If war then be the act of the nation, whatever is done in the prosecution of it, must either expressly or impliedly be under the national authority. Whatever private benefits result from it, must be from a national grant. "War (says Vattel, p. 268) is that state in which a *nation* prosecutes its right by force." The right of making war belongs alone to the sovereign power. Individuals cannot control the operations of war, nor commit any hostility (except in self-defence) without the sovereign s order. "The generals (adds that writer) the officers, the soldiers, the partizans, and those who fit out private ships of war, having all commissions from the sovereign, make war by virtue of a particular order; and the necessity of a particular order is so thoroughly established, that even after a declaration of war between two nations, if the peasants themselves commit any hostilities, the enemy instead of sparing them, hangs them up as so many robbers or banditti. This is the case with private ships of war. It is only in virtue of a commission granted by the sovereign or his admiralty, that they are entitled to be treated like prisoners taken in a formal war." *Vattel, p.* 365, '6. If, then, on the general principles of civil society, the whole operations of war depend upon the will and authority of the government, surely the appropriation and distribution of the property acquired in consequence of those operations, must equally be subject to the control of the government, and depend on those regulations which it may establish.

2. What indeed is *the object* of war? Is it to aggrandize individuals, or is it to maintain the rights of the nation? "The just and lawful scope of every war (observes Vattel,

p. 280) is to revenge or prevent injury. If to accomplish this object, it be expedient to encourage individual warfare, by granting all the profits arising from it to the parties engaged, the nation has a right to promise this encouragement; but until this encouragement be actually offered, it must follow that every thing which is acquired by individuals, whether acting as private persons or as part of the public force, must belong to the nation under whose authority they act."

3. What rights are acquired by a state of war? "A nation (says Bynkershoek, p. 4) who has injured another, is considered, with every thing that belongs to it, as being confiscated to the nation which receives the injury." The rights accruing, therefore, are national altogether. They are not individual rights. The case seems analogous to that of the internal administration of justice. A civil society—a nation—has the right of punishing those who are guilty of violating the public laws. Though the guilty be members of their own community, they may forfeit their property or their lives. But the right of the body politic does not attach itself to the individual members of it. The nation, indeed, *might* authorise individuals to take the lives or the property of known offenders—but without an authority delegated by the nation, individuals have no such right. A right in private persons to avenge violations of the law does not follow as a natural consequence from the circumstance of their being members of the great political body. On the contrary, the very same act which would be retributive justice when emanating from the sovereign power, would become murder or robbery in the individual. Why should it be otherwise, as it regards our intercourse with other nations? Why should a nation be less jealous of its rights, with regard to hostile nations than with regard to hostile individuals—why less jealous when they are encroached upon on a large scale, than when they are encroached upon on a scale truly small and insignificant? And even admitting, that in the one case the public authority permits an individual to execute the

sentence of the law, and in the other to attack and vanquish the public enemy; it will not follow that in either case the property of the enemy is to become the property of the individual by whom the national will is carried into execution. This, it should seem, must depend on express stipulations made in behalf of the nation. Agreeably to these principles, the celebrated M. De Vattel, after observing that a nation has a right to deprive the enemy of his possessions and goods, of every thing which may augment his forces and enable him to make war, goes on to remark, that *booty* or the moveable property of the enemy taken in war, belongs to the sovereign making war, no less than his towns and lands: for he alone—*(the sovereign authority)*—has such claims against the enemy, as warrant him to seize on his goods, and appropriate them to himself. His soldiers (he adds) are only instruments in his hand, for asserting his right. He maintains and forms them. Whatever they do, is in his name and for him. *Vattel* 335. These principles are equally applicable to every form of government. It is perfectly immaterial with whom the sovereign authority resides. With whomsoever it resides, its power is erected on the doctrine of its being the legitimate representative of the nation—and the rights of the nation are not surely to be considered as being less, under a republican, than under a monarchical form of government.

The nation, however, as I have observed before, may give a bounty to individual captors—may relinquish a part of its rights to those who fight under its banners. Agreeably to this, the same writer goes on to observe that "the sovereign may grant to the troops what share of the booty he pleases. At present most nations allow whatever they can make on certain occasions, *when the General allows of plundering* what they find on enemies fallen in battle; the pillage of a camp when it has been forced, and sometimes that of a town taken by assault." The cases here enumerated, seem to be those where either the object was too trifling to become a matter

of national attention, or, where the services previously rendered by the troops, called for a degree of vigor and exertion which would merit extraordinary encouragement. The whole, however, is made to depend on the *will of the nation*, expressed through their commanding General. The soldier (he adds) in several services has also the property of what he can take from the enemy's troops, when he is on a party, or in a detachment, excepting artillery, military stores, magazines, and convoys of provisions or forage, which are applied to the wants and use of the army." He then goes on to observe, that when even this custom is introduced into an army, the same right should be allowed to auxiliaries as to the national troops: but proceeds to inform us, that among the Romans the whole booty was carried to the public stock, and sold under the direction of the General, who then gave a part of the proceeds to the soldiers, and remitted the rest to the public treasury. *Vattel* 335, '6. It is evident from the whole strain of this passage, that the author is not attempting to lay down general principles by which nations are *to be governed* in the disposition of property taken from an enemy; but, is merely describing the *practice* of different nations. *In several services*, says he, that is, in the service of several governments, the soldier has, on certain occasions, the property he takes from the enemy; but it was otherwise, he adds, among the Romans.

I have been more particular in stating the principles laid down by writers on the law of nations (or the dictates of justice and common sense, as applied to national intercourse) because the attorney for the claimant, whilst acknowledging that the laws of the United States are silent on the present case, places a great reliance on the injunctions of national law. It is contended that the law of nations gives the booty in this case to the captors, and the principal authority appealed to, is that passage in Vattel, which I have just quoted, where, as I conceive, he is simply narrating the usages of

some governments, and not laying down principles which are *binding* upon all.

What, indeed, is the law of nations? It is that rule of conduct which regulates the intercourse of nations with one another; or, in the words of the author last cited, "the law of nations is the science of the law subsisting between nations or states, and of the obligations that flow from it.' *Vattel* 49. It is a law for the government of national communities as to their mutual relations, and not for the government of individuals, of those communities, in their relation towards one another—nor can it controul the conduct of nations towards their own citizens, except in cases involving the rights of other nations. Property once transferred by capture, must be subject to the laws of the nation by which the capture is made. The question whether it shall be public or private property must depend on the regulations adopted by the nation making the capture, and cannot naturally be regarded as subject to the controul of a system of laws which has respect to the rights and duties of nations towards one another. What our author states, as to the practice of nations towards their citizens, is not, truly speaking, a delineation of the laws of nations. The conduct of nations towards their own citizens, must depend on their own municipal regulations. It is by the laws of nations that we must determine the circumstances, under which prizes may be taken; but what is to become of them when taken under the sanction of that law, cannot depend upon the law of nations, but must depend upon the will of the nation by which the capture is made. Individuals of the capturing nation can have no right independent of the nation to which they belong. It is by a reliance on the authority of their nation, that they shelter themselves from the charge of robbery or piracy. The sovereign, however, may distribute the booty as he pleases. He may do it by a general law, or by special regulations, issued by his Generals, subject to the emergency of the case; provided the form of government admits of

such a delegation of authority. Even the property acquired by privateers, depends on stipulations made with the supreme power of the country to which they belong. "Persons (says Vattel, p 367) fitting out ships to cruise on the enemy, in recompence of their disbursements and the risk they run, acquire the property of the capture: but they acquire it, *by grants from the sovereign who issues out commissions to them.* The sovereign either gives up to them the whole capture or a part—this depends on the contract made between them." As to those who, without any authority from their sovereign, commit depredations by sea or land, they are regarded as *pirates* and *plunderers*, and things taken by them do not thereby undergo a change of property.—*Bynkershoek, p.* 127. The discussion, therefore, entered into by Bynkershoek, in his 20th chapter, respecting the captures made by vessels not commissioned, for the purpose of determining whether they should belong to the owner of the ship, to mariners, or to the shipper, (and on which a good deal of stress has been laid in argument) has really but little or nothing to do with the present case. That writer, having previously laid down the established doctrine about robbery and piracy, proposes, in his 20th chapter, to examine to whom a prize would belong which was taken by a non-commissioned vessel, *attacked by the enemy*, and in her own defence, seeing the enemy's vessel making the attack. He seems to take it for granted, that the government would put in no claim under such circumstances; and *under this supposition*, is merely canvassing the respective claims of the sailors, the shipper, and the owner. He afterwards states an objection, which may be raised against him, in the following words:

"It will be said, perhaps, that I am wasting words on an idle and useless question, as it is unlawful to make captures without a commission from the States General, or the Admiral; and so far from the one who takes a prize, without such a commission, being entitled to it, he is rather to be considered as a pirate, agreeably to the principles which I

have above contended for"–*page* 161. He then quotes Grotius, to shew that a prize *taken under circumstances of necessity*, belongs to those who take it.

The doctrine, therefore, which he contends for, has relation simply to the case of a mercantile vessel, which *being attacked* at sea by the enemy, successfully resists the attack and makes a prize of the adverse party. It has clearly no relation to the case now before the court. His reasonings have in general a reference to the laws of the States General of the United Provinces—and the learned translator, in a note upon this chapter, seems to state the discussion of the author as founded on the *supposition* merely, that any persons, *other than the sovereign of the captor*, may be considered as entitled to the prize.–*Page* 156. Again, in a note at the end of the chapter, he observes : " In France and Great-Britain, prizes taken by non-commissioned vessels, belong to the Lord High Admiral, as a *aroit* of his office. No distinction is made whether the captor did or did not make the capture in his own defence, or from some other justifiable motive. But as in Great-Britain the office of High Admiral is vested in the King, and has for a long time been executed by commission, suitable rewards are given, *at the discretion of the government*, in meritorious cases." *Page* 162.

The English law, on this subject, seems to be pretty clearly laid down in the course of argument on the case of Lord Camden against Home and others—and I do not observe any thing in the decision of the court to impeach its accuracy. " Whatever is taken by any of the King's subjects from an enemy, in the course of naval operations, appertains to the King, either as a *jure coronæ*, or as a *droit* of Admiralty, according to the circumstances If taken by a private ship, without any commission from the King, the prize belongs to him as a *droit* of Admiralty. If such a ship had a commission, only one-tenth of the prize belongs to the King as

a *droit* of admiralty, and the rest is the property of the owner of the privateer. But where the capture is made by the King's ships or forces, the property is vested in the King's *jure coronæ;* and in such cases it is judged by the admiralty *lawful prize to the King.* But that adjudication by no means imports the capture to have been made by the King's *ships* exclusively—for if it were made by his *forces*, the adjudication would be the same. Now there are three sorts of joint captures—one by the King's ship and privateer, with letters of *marque*—the distribution whereof is made, according to the number of persons on board the several ships—the King's share being adjudged to him in the *jure coronæ.* The second instance is of a capture by the King's ship and a *non-commissioned* privateer. There the King is entitled to the whole :—to the privateer's part thereof, as a *droit* of admiralty, and the other in *jure coronæ* according to the same mode of distribution The third is the instance in question, of a capture by the King's army and navy conjointly; and there the whole rests in him *jure coronæ.*" 4 *Term. Rep.* 387.

Agreeably to this statement, we find that Sir Wm. Scott granted a monition against the master and owner of a privateer not commisioned against the Dutch, to bring in the proceeds of a Dutch prize. The party appearing acknowledged that he had no commission, but prayed to be admitted as a joint captor. The court did not even suffer the case to be argued, but observed :—" The person admits that he had no commission. It is therefore impossible for him to contend for a legal interest in joint capture. If he thinks he has any equitable claims, arising from any services he has performed, they may be represented to the admiralty.

" The former proceedings (of condemnation at Jamaica) on the part of the non commissioned captor, are mere nullities ; and the property must be proceeded against as droits of admiralty."–4 *Robin. Rep. p.* 59. The case of the Re-

becca, which was a question of interest in the capture of a vessel made by naval officers from the island of St. Marinou, a naval station, used for the temporary accommodation of the crews of ships of war, gave occasion to remarks from Sir William Scott very applicable to the case now before me. "I accede, says he, entirely to what has been laid down, that a capture at sea, made by a force upon land, (which is a case certainly possible though not frequent) is considered generally as a non-commissioned capture, and inures to the benefit of the Lord High Admiral.

"Thus, if a ship of the enemy was compelled to strike by a firing from the castle of Dover, or other garrisoned fortress upon the land, that ship would be a *droit of admiralty*, and the garrison must be content to take a *reward from the bounty of the admiralty*, and *not a prize interest*, under the King's proclamation. All title to sea-prize must be derived from commissions under the admiralty, which is the great fountain of maritime authority; and a military force upon the land is not invested with any commission so derived, impressing upon them a maritime character, and authorising them to take, upon that element, for their own benefit. I likewise think, cases may occur in which naval persons, having a real authority to take upon the sea for their own advantage, might yet entitle the admiralty and not themselves, to a capture made upon the sea, by the use of a force stationed upon the land. Suppose the crew, or part of the crew, of a man of war, were landed, and descried a ship of the enemy at sea, and that they took possession of any battery, or fort upon the shore, and by means thereof, compelled such ship to strike:—I have no doubt that such a capture, though made by persons having naval commissions, yet being made by means of a force upon the land, which they employed accidentally, and without any right under their commission, would be a droit of admiralty and nothing more." 1 *Robin. Rep. p.* 197.

Another case in which the right of a party not commissioned for the purpose, to share in a prize, came into view, was that of the Providence, a commissioned vessel, and the Spitfire, a vessel not commissioned, against the Dutch, and who jointly took a Dutch ship.

The Judge of the high court of admiralty, gave to the Spitfire half the share she would have been entitled to, if she had been commissioned—but the Lords of Appeal pronounced the whole share of the Spitfire liable to confiscation, as a droit or perquisite of admiralty. And yet in this case the Spitfire had not only applied for *letters of marque*, but had obtained a warrant for them to the Judge of the Admiralty, who, on account of the pressure of business, did not issue them till the day after the capture.–2 *Rob.* 235—*note.*

An English act of Parliament provides, "that in all conjunct expeditions of the navy and army against any fortress upon the land, directed by instructions from his Majesty, the flag and general officers and commanders, and other officers, seamen, marines and soldiers, shall have such proportionate interest and property, as his Majesty, under his sign manual, shall think fit to order and direct."–2 *Rob.* 237.

The prize act of the 21st George III. gives to the officers, seamen, and *soldiers* &c. *on board* every ship and vessel of war in the King's pay, the sole interest in prizes taken by them.–4 *Term. Rep.* 391. It should seem as if their courts adhered pretty strictly to the words of their laws in adjudging to whom captured property belongs, and took care to give it to the crown, where there is any doubt about the right of individuals. Thus, in the case of the ships taken at Genoa, which were given up, on the payment of 17,000 pounds by the owners, Sir William Scott said—"I am not aware that the prize act authorises me to condemn *to the captors*, in such a case as the present. The act gives them *ships*, *goods*, &c. *afloat*. This is a sum of money, which is not exactly of that description of things."

On this account, and another which he mentions, he made the condemnation pass to the crown.–4 *Rob.* 329.

In the course of argument, in the case before me, the counsel for the military force at Mobile Point, laid some stress on the observations of Sir William Scott in the case of the Dordrecht, which was a case of joint capture between the army and navy, and where the Judge seemed to admit that there might be grounds for making the condemnation partly to the benefit of the army, although the case did not come within the provisions of the act of Parliament, which directed the army to share, in some cases, in conjunction with the fleet. It has from hence been concluded, that a condemnation might have been made to the army under the law of nations. It is possible, however, that there are other British statutes, besides the 33d of George III. (the statute there referred to) under which the army preferred its claim. It may have been built on some royal proclamation: but that it *could not have been* founded on the law of nations, or on any general principles growing out of a system of national law, must surely be sufficiently apparent from the observations and authorities which have already been brought into view.

But the main stress seems to be laid on the consideration that the duty of the army is to fight on the land—that our troops are employed for that especial purpose—that land forces are not required to fit out boats and go to sea, and that fortune having thrown this prize in their way, it ought, on the principles of national law, to be condemned to their benefit. The view, however, which has been already taken of the law of nations, and the objects to which it can apply, seems to take off the weight of this argument. And how much soever one may regret that the gratification is not within the reach of this court to be the medium of awarding a prize to the gallant defenders of Fort Bowyer; it is its duty not to interfere with the prerogatives of the legislative or

executive branches of the government; and it must not be disguised, that if the troops at the fort were not, as it seems to be alleged, under any obligation of noticing the approach of an enemy, unless it were made on *terra firma;* if every thing done to obstruct or capture the enemy on the sea, were merely gratuitous, and beyond the line of their duty, (a doctrine which those gallant men themselves most certainly never would advance,) then their conduct in so transgressing their line of duty, would rather stand in need of apology than of reward. "Soldiers (says Vattel, p. 367) can undertake nothing without order, either express or tacit, of their officers. Obedience and execution are their province. They are not to act from their own opinions. They are only instruments in the hands of their commanders. Let it be remembered here, that by a tacit order, I mean the substance of what is included in an express order or in the functions committed to us by a superior; and what is said of soldiers must also be understood of officers, and of all who have any subaltern command: Thus, with respect to things, the care of which is not committed to them; they may both be compared to mere private persons, who are to undertake nothing without order. The obligation of the military is still more strict, as the laws of war forbid, expressly, acting without order; and this discipline is so necessary, that it scarcely leaves any thing to presumption."

"To fight without command, is almost always considered in a soldier as fighting against command, or against the prohibition."

For my own part, I do not believe that our valiant solders, who, but a short time before, so much distinguished themselves at Fort Bowyer, would be considered, with regard to this vessel, as fighting without command. A fort so situated, on a narrow, barren point of land, unconnected with any settlement of moment, but commanding the entrance by water into an extensive and valuable country, must, from

the very nature of it, be considered as intended to prevent the ingress of enemy's vessels; and it became the duty of the garrison stationed there, to guard the pass and to lay hold of every thing belonging to the enemy, whether the object could be accomplished by means of the guns at the fort, or by means of boats or other vessels attached to it.

The only question then, which remains to be considered, is, have the laws of the United States given to the military any share in prizes taken by troops so circumstanced? It may be desirable that they had done so. But this ground seems to be abandoned by the counsel for the army. A kind of negative argument has indeed been raised on the 58th article of the Rules and Articles of War. It is said that this article confirms to the United States property taken in *camps, &c. but not at sea.* The words of the article in question are, that "all public stores taken in the enemy's camp, towns, forts, or magazines, whether of artillery, clothing, forage, or provisions, shall be secured for the service of the United States; for the neglect of which the commanding officer is to be accountable." Hence it is concluded, that if they be not public stores, or be not taken in the enemy's camp, towns, forts, or magazines, they are not to be appropriated to the government, but belong to the captors.

The object of this article is clearly not to ascertain any thing about the right of property, but merely to provide for the safe keeping of public stores belonging to the enemy, and to render the commanding officer responsible for any neglect respecting them. Had a prosecution been commenced against the officer commanding at Fort Bowyer, for any inattention to the preservation of the cargo of the schr. Active, this 58th article, possibly (inasmuch as the property in question was not taken in the enemy's camp, towns, forts, or magazes) might not have afforded a legal basis for the prosecution; but no fair deduction from it certainly can ever be carried so far as to shew, that because the property captured

was not expressly required by this article to be secured for the United States, therefore it must be regarded as the private property of the captor.

Whether it be so or not, must depend on established principles, and not on so very strained an implication: and these have already been sufficiently examined.

As to the laws of the United States respecting property captured by the public force, the most material is the act of the 23d April, 1800, for the better government of the Navy.

This act gives to the captors the proceeds of vessels and goods taken on board of them when adjudged good prize. But this act is a law expressly for the government *of the Navy* of the United States—and, indeed, it does not appear to be contended, that it can, by any rules of construction, be extended to the army.

Private commissioned vessels, in like manner, derive their right, to appropriate to themselves the prizes they make, from the "act concerning letters of marque, prizes and prize goods," passed on the 26th day of June, 1812.

This act, after stating the conditions on which authority should be given to our vessels, to capture the vessels and property of the enemy, proceeds to vest the same, when taken under such authority, in the owners, officers and crews of the vessels by which prizes should be made.—*Laws U. S. Vol.* 11, *p.* 240. Had it been the intention of the government, that non-commissioned vessels should be entitled to the proceeds of prizes made, or that any persons in the employ of the United States, and not belonging to the navy or marines, should be entitled to the benefit of all enemy's property taken by them, it would surely have been natural that such intention should have been expressed in these or some other legislative acts. Moreover, indeed, it does not appear what occasion there could be to provide regulations and bonds for

the government and good conduct of vessels applying for commissions to make prizes, if *all vessels* of any description were authorised to take and to appropriate to their own use the property of the enemy, merely because, as it hath been contended, the fortune of war had thrown it in their way.

It has been stated that a case occurred in New-England soon after the war commenced, where a vessel, which had approached near to a fort of the United States, was condemned for the benefit of the troops by whom it was captured: and it is likewise urged that libels have been filed in behalf of military captors in the federal court of the State of Louisiana. As to the former case, it is only stated on a recollection, which I cannot help believing to be, in this instance, somewhat inaccurate; and as to the latter, how much soever it may afford a precedent sufficient to justify a practitioner at the bar in putting in a claim, it can afford no precedent to justify a court in sustaining it. In the whole view of the case, therefore, now before the court, it is adjudged, and decreed, that the plea be overruled, and dismissed, with costs in court, occasioned by the plea, and that the schr. Active and cargo be condemned as good and lawful prize to the United States.

MISCELLANEA.

ON THE CONNECTION BETWEEN THE STUDY OF RELIGION AND THE LAW.

I am now to treat of Religion, and of the claims which it has upon the acknowledgment and support of him, who sustains the character of an advocate in our courts of justice.

The worship of a Supreme Cause and the belief of a future state, have not only, in general, been concomitant, but have so universally engaged the concurrence of mankind, that they who have pretended to teach the contrary, have

been looked upon in every age and state of society as men opposing the pure emotions of our nature. This Supreme Cause, it is true, has been prefigured to the imagination by symbols suited to the darkness and ignorance of unlettered ages; but the great and secret Original has nevertheless been the same in the contemplation of the simplest heathen and the most refined christian.

There must have been something exceedingly powerful in an idea that has made so prodigious a progress in the mind of man. The opinions of men have experienced a thousand changes; kingdoms that have been most powerful have been removed; the form of the earth itself has undergone various alterations; but, amidst these grand and ruinous concussions, religion has remained unshaken; and a principle so consentaneous to the first formation of our nature must remain until, by some power, of which, at present we have no conception, the laws of that nature are universally dissolved.

Powers thus singular must have their foundation in truth; for men may rest in truth, but they never can rest in error. To charm the human mind, and to maintain its monstrous empire, error must, ere this, have chosen innumerable shapes, all, too, wearing, more or less, the semblance of truth. And what is thus true must be also just; and of course, to acknowledge its influences must be the spontaneous and natural effusion of a love of truth; and the love of truth either is really, or is affected to be, the character of those who have dedicated themselves to the study of our laws.

Thus naturally, even upon the first glance, do the characters of the lawyer and the supporter of religion meet; the conclusion must be, that he who affects to doubt of the fundamental truths of religion, much more he who dares to deride them, is dissolving by fraud and violence, a tie which all good men have agreed to hold in respect, and the violation of which must render the violator unworthy the esteem and support of his fellow creatures.

But having thus endeavored to establish the relation between the study of the law and an adherence to religion, let us no longer delay to inquire in what points of view religion comes most powerfully recommended to the notice and veneration of the student.

And we will confine our discussion, which shall be as brief as possible, to two ideas: first, its own intrinsic dignity and purity, considered with respect to a future state, and to its influence over the morals of men; and, secondly, its connection, in a political point of view, with the various conditions of society, and with the laws by which they are regulated. The first, it is true, relates to the advocate merely as a participant with other men in one common rational nature; but it relates also to his individual and abstracted character, and as such, is surely not unworthy of his consideration. The second claims our notice, as intimately connected with that very individual character alone.

It is evidently a false notion that religion is a visionary speculation, unworthy the serious regards of men who are engaged in the pursuits of scientific and philosophical learning. Religion performs that which philosophy, considered as distinct from it, (and which, in such case, I call philosophy only to accommodate myself for a moment to the language of fashion) cannot do; she carries the mind up directly to the Eternal Source of knowledge, while this boasted philosophy, confined to the present limited sphere of action alone, serves only to bewilder the mind in the mazes of doubt and error, which itself has formed. It is ever employed in raising questions that it has neither power nor inclination to solve. Religion enlightens the mind; she enables it to fix to every acquisition of learning and of virtue its proper value, and to discern its appropriate nature; she ennobles it, by the simplicity of truth, that disdains those quibbles and that little war of words that have disgraced the ancient, and that continue, I observe with concern, to de-

grade the modern schools; but this favorite philosophy, which its adherents would fain palm upon the world for a novelty, is continually employed in inventing sophisms that spring up only to be defeated by the common sense, and to be overthrown by the daily experience of mankind.

Consult the works and the lives of them who have embraced religion and rejected this false and foolish philosophy; compare them with the works and with the lives of the men who have labored to destroy the one and establish the other. And here, as to the former, I need only desire you to look into the list of those whose names have dignified our laws; behold the manly openness of their language and their conduct; all is manifest and clear like the light from which they are derived. How different from this dignified nature are the obscure surmises, the dark hints, the querulous doubts of the contrasted character! What is there that is generous or noble in their arguments? Do they tend to discover the truth with simplicity? Do they not rather endeavor to entangle it by the subtlety of disputation, or overpower it by a multitude of words? That which is true is single, and its language goes directly to the understanding and the heart; that which is untrue, but which nevertheless assumes the appearance of truth, must be double, and its language consequently perplexed; it has, indeed, a twofold task to perform; it has to conceal its own secret and genuine character, and to support a borrowed one. Take this idea constantly in your recollection, and you will presently be able to admire the character and the works of the one, and to detect the assumption and designs of the other.

Now if this be true, I would ask you whether you think yourself, as a lawyer, wholly independent of the influences of religion? Do you think it beneath you to receive great and expanded ideas of truth from the same Mighty Source from which those great men have received them, greater than whom we can scarcely hope to behold? Or do you

prefer to such clear and enlarged principles, the petty inventions and indecent quirks of human subtlety? I have before hinted, and I here openly repeat, that no man who delights in the latter of these will ever do honor to any situation in life: but most unequivocally will he disgrace that character that has to do with the explanation and the business of the English laws; and therefore, if contemplation of the dignity and purity of religion will exalt the mind to the plainness and simplicity of truth; if plainness and simplicity be contrary to the finesse and subtlety of the philosophy I have mentioned; it will require no uncommon portion of sagacity to discern, that the advocate is materially interested in the cultivation of the one and the destruction of the other.

It appears to me an ungracious, if not a difficult task, to account for the unwillingness that men of learning discover to the avowal of any religion; though at the same time I am ready and happy to grant that many may affect a reluctance upon this head, which they do not secretly possess; that which is dignified and pure seems to be naturally congenial with the influences of learning and wisdom; religion I have shewn to be dignified and pure; religion, one would think, would be therefore universally accepted and openly acknowledged by those who are alive to the influences of learning and wisdom; but I apprehend the truth to be, that there is in the world a very small number of deeply learned and truly wise men, many who have taken up these characters, being only, in fact, mere smatterers in knowledge.

And here the coincidence between the dignity of religion and the excellency of the character of a lawyer appears in a new light: a smatterer, a mere superficial taster of knowledge, is as incapable of understanding the nature of religion, as he is of becoming a consummate lawyer: great depth of penetration, acumen of remark, and patience of investigation, are equally the characteristics of the one and of the other; and it is doubtless worthy of serious observation, that the

greatest lawyers which have been produced in this country, within the last two centuries, have been men acknowledging, in plain terms, the government of a Supreme Being, and the hope of a future state; men, not seeking to perplex the human mind with uneasy doubts and far fetched sophisms, but laboring to exalt learning and the sciences, by demonstrating their progress from the same Eternal Source from which religion itself has sprung.

Emulous as you are of the honor that will ever attend excellence in every other part of your studies, and of your future purposes, can you see any reason why your emulation should decline in this? If religion, as flowing from the Almighty Spring of truth and justice, be the pure and dignified principle I have asserted it to be, do you think its influences can have the effect to debase and degrade you? Has it debased and degraded the great men to whom I have just alluded? Has it not rather been the very means of their exaltation? And what power, think you, should operate to alter the great law of nature as to cause and effect with regard to you? Be not deceived; be content, nay, be happy that religion presents you with those enlarged and energetic views of the truth that will enable you to rise a superior being in this world and in another.

I have, in some of my former letters, endeavored to impress upon your mind the necessity of attending to the practice of the moral science. Now of this science religion appears to me to be not only the source but the perfection also; it is that which not only leads us to the performance of our duties, but teaches us to understand and define them. It should seem, therefore, that a refined and useful morality is but a consequence of religion; but morality is necessary to the completion of the legal character, and religion is the source or parent of morality.

I insist not here upon the validity of the holy scriptures as containing most clearly the pure dictates of this religion,

because it is beyond my purpose to engage in defence of particular modes or opinions; I shall only observe, therefore, that it appears somewhat unaccountable to me, that men who seem to confess their belief of a natural religion should hesitate to receive the sacred writings, which contain the most beautiful and clear expositions, not only of that belief itself, but of the duties also that spring from it. However, I would have you read them with coolness and impartiality; compare them with other compositions that contain the principles of religion and morality; and if you find in them a language and design of a superior nature and congenial with the unbiassed sentiments of your heart and mind, adopt and retain them; and be not so little of a man as to appear ashamed of that which your solid judgment and natural feelings have engaged you to adopt and retain.

It is the nature of religion to preserve unbroken that secret chain by which men are united, and, as it were, bound together; and as you are interested in common with the rest of your species in its preservation, particularly does it become you, as a professor of those laws which are one of its instruments, to display an anxiety to guard it from violence or contempt. Yet how do you do this, if you are either forging doubts yourself, or listening to them who forge doubts of the existence or authenticity of religion? It is the great aim of those who would overturn the peace and order of mankind to undermine the foundations of religion, by starting doubts and proposing questions, which, being artfully calculated for every turn, are apt to dazzle and confound the common apprehension, like that famous question of the Elean philosopher, Can there be any such thing as motion, since a thing cannot move where it is, nor where it is not? Yet, by questions of an equally foolish and unmanly nature, do many men, of no inferior learning or capacity, suffer their time and their attention to be miserably wasted! But do you not perceive the mischievous tendency of such questions?

Do you not see that, by rendering every principle doubtful, they loosen all those sacred obligations by which men are kept within the bounds of duty and subordination? And shall you, who are continually in public to call out for the interposition of the law against injustice and wrong, be for ever in your private parties and conversations laboring to weaken every known and settled principle of justice and of right?

Give me leave to say, it is a weak pretence that is made use of by those who are thus unworthily engaged, that they are searching after truth; and indeed it is merely a pretence; for it is curious enough to observe, that many of these searchers after truth are men who have been employed near half a century in this pretended pursuit, and yet have they not settled one single principle; nay, they are more full than ever of doubts and conjectures: and as age and fatigue have exhausted their strength and robbed them of their wit, their questions gain in childishness and folly what they lose in subtlety and invention; nor is this a single case; I never in my life met with an old searcher after truth, but I found him at once the most wretched and the most contemptible of all earthly beings.

The fact is, the men I mean, are not searching after the truth; for where is it to be found? or who is to be the judge of it, when every certain principle is shaken or overthrown by which the decision is to be made? They have robbed their own minds of a resting place, and they would reduce the minds of others to the same unhappy and unsettled condition. With this spirit they attack every sentiment whereon men have been accustomed to rely: and as words are the common medium through which ideas are delivered, they play upon the meanings of words till they have thrown every thing into that confusion which, unfortunately for themselves and for others, is so congenial with their debased inclinations.

The propagation of doubt, with respect to religion, is at all times an injudicious, and frequently becomes an immoral act. He who seeks to destroy a system by an adherence to the pure principles of which mankind may be kept in peace and virtue, (how delusive soever he may esteem that system to be) without proposing a better for that important purpose, ought to be considered as an enemy to the public welfare.

I am here naturally led to consider religion as peculiarly powerful in settli g the mind. It is impossible for a great and expanded intellect to be untouched by considerations of so great importance as those which religion presents to the contemplation ; it will therefore either decide in certainty, or it will wander in doubt ; for, to a thinking mind, what intermediate state can there be ? And he that is in doubt, as I have before observed, cannot be at rest ; and he who is not at rest cannot be happy. Now if this be true of doubt, the reverse must be true of certainty, which is a contrary influence. And need I point out to you the necessity of such a state to a mind engaged in the pursuit of a science so various and profound as the law ? Or, on the contrary, how utterly impossi le it is for a mind entangled in scepticism, according to the modern idea of that term, to attend with regularity and happiness to an object so important ? Let me advise you to rest satisfi d with those clear and fundamental truths upon which so many great and wise men have rested before you ; and that, not merely because they have thus rested, for that would not be to be like them, but because they are ascertained by your uncorrupted sentiments, and produce clear ideas of the various virtues that adorn and elevate the mind, and also, which is of still greater importance, that stimulate you to the continual practice of them.

It is in vain to trifle about words and terms. Does a man know, or does he not know, whether the thing he is about to do be just or unjust ? Does he feel, or does he not feel, a secret dread and shame at the latter, and an inward free-

dom in the former? Does he see, or does he not see, a beauty, a harmony, and a connection in his own formation, and in the structure of the universe, which human art cannot reach? Then whence is this internal sense, this reflection, this beauty, harmony and connection? It is agreed, that neither man, nor any other visible agent, has produced them; yet they are. And is it not a natural conclusion, that they are the consequences of some mighty but invisible cause? Why then not be content to argue in this respect from the effect to the cause, and rest satisfied with that as a matter of faith which the reason of man has never yet been able to explain? Reflect upon the thousands who are now in their graves, whose lives were spent in endeavors to ascertain that power which mocked all their efforts and baffled all their ingenuity: learn from them to confide in that first Great Cause, which, though it be hidden from your sight, you most sensibly feel, and against which your feeble arm is raised in vain.

If you will take my advice in this respect, I venture to say you will find yourself by so much the better and happier man. By possessing accurate and settled notions of the moral science, you will be able to act your part in life with the dignity of wisdom; and by possessing a firm and even mind, you will be free from those distractions from which the doubter is never free. What is the grand aim and end of knowledge, but to regulate our practice? And whence is this knowledge primarily to be acquired? from books? from men? No; by contemplation of these, it is true, our knowledge may be enriched and augmented; but it must first spring from the secret source of our own bosoms; these let us search with impartiality, and we shall need the assistance of no fine spun theories, no finesse, no subtlety, to discover the truth: truth is of a certain, simple nature, and accordingly all will be certainty and simplicity here.

With your mind thus settled upon the solid basis of truth, you will be able to pursue the honorable avocation of the

bar in peace. Believe me, it will require all your strength; you will have no time, if you attend to the duties of your profession, to be eternally cavilling about terms and principles; and, in fact, it will be a mark of dishonorable weakness if these are found to be not well settled in your breast before you enter upon the career of public life.

Let us now proceed to the second division of the subject; the connection that subsists between religion in a political point of view, and the various conditions of society and the laws by which they are regulated.

There never yet has been a state without an establishment of religion; and in those nations who have existed under the influences of undebauched and simple nature, that establishment has been the chief concern; it has been reserved for the happy ages of refinement and philosophy to engender doubts of the existence of a Supreme, and boldly to overthrow his altars into the dust: yet few even of those who have been thus secretly crafty or openly impious have opposed national establishments of religion; though they have not scrupled to turn them into contempt, by declaring them to be useful only for the vulgar.

In all well-governed states these religious establishments have been connected with the laws of the country in the same way that all other establishments have been so connected, namely, being subordinate to their regulation and government; but they become more interesting, and claim a greater notice than other establishments in proportion to the superiority of their extent and dignity.

If, therefore, it be granted as a fact, that religion cannot subsist in any country as a national establishment without becoming thus connected with the laws of that country, it must become so through the only two mediums through which all other things become the objects of their cognizance, the conduct of its professors, and its worldly posses-

sions: for such is the power of all mundane influences, that not even the purity of religion can protect any regular system into which it may be formed, from the necessity of being supported by a certain degree of wealth and power, nor defend its professors from the common weakness of humanity, all excesses of which it is the object of well-formed laws to restrain.

Wealth and power and the conduct of men are therefore sensible objects upon which the laws of a community operate, whatever may be their description, or wherever they are to be found within that community; and, although they may constitute the establishment of a pure and divine religion, yet must they, as subservient to its earthly purposes, be composed of gold and silver, and so on, and consequently be subject to all those transmutations that are unavoidably incident to possessions of this sort. Nor is there any peculiar purity communicated to the nature of these objects by the dignity and holiness of their religious possessors, whereby they are rendered too high or too sacred for the interposition of the law of the land.

This being the case, it naturally follows, that, with respect to these possessions, numerous embarrassments and misunderstandings will arise, which, but for some powerful interference, would shortly breed the utmost disorder amongst the professors of this national establishment; and the right of interference I have already shewn to be in the legislature of the country, till, by degrees, that portion of the law, by which these matters are ascertained and regulated, forms a very capital object of the research and attention of the student.

Such has become, very eminently, the fact in this country; for, independently of the ecclesiastical jurisdiction properly so called, the religious establishment of England has attracted, in various directions and from numerous causes, the notice of the common and statute law and of our courts of

equity; so that he who is ignorant of the nature and history of religion and of its consequences, in this view of the subject, is ill qualified to sustain with honor and reputation the character of an English advocate.

In causes, therefore, that spring from this source you may, in the course of your future life, be frequently concerned; and I am anxious that you should be, in this as well as in every other point, well prepared with all those sources of argument, proof, and illustration, which can, indeed, be in the possession of him only who has taken repeated, accurate, and extensive views of the subject.

And this, you will remember, my friend, is not to be done with little labor, or in a moment; since even were you inclined to rest contented with a knowledge of its technical parts alone, to which I recommend a most diligent attention; yet the number of statutes that have been passed, and the variety of cases that have occurred in this department of the legal science, will prevent them from being presently engrafted upon the recollection; but, in truth, my opinion in this is the same that has been heretofore given you upon other branches of this extensive study. A technical knowledge, however valuable and necessary, will never of itself be sufficient to render a man excellent in his profession; and you will therefore have a still greater task to perform in the perusal and digesting of the best authors who have written upon religion, and upon the numerous forms and establishments it has assumed in the world.

For it will not, I apprehend, be sufficient for this purpose to have an acquaintance with the present state of the religious establishments of your own country, or with that establishment only; your researches must go back to the earliest authentic ages, and extend to the remotest periods of other countries: by these means alone you will be enabled to enlarge your mind, to place your arguments most forcibly, and

to illustrate them in that manner which is peculiar to a few, because to a few only belong the opportunities which patience and talents present of investigating the subject and tracing it to its source.

Do you wish to obtain the rare and valuable faculty of solving difficulties and obviating doubts, by the exercise of which obscurity is in a moment rendered clear, and darkness changed into light? It is to be acquired only by industrious reading and profound contemplation. Do you desire to know upon what subject this power can be most worthily exercised? I answer, Religion in all its varieties; of its purity as it came forth from the hand of its Omnipotent Founder, and of its degeneracy under the operation of human influences.

Persevere then in tracing, by labors of this nature, the forms and laws of religion to their source; the reward will not be disproportionate to the labor; you will not only be enabled thereby to stand as an advocate upon a very superior ground in a court of justice, an advantage of no small importance; but you will also establish your mind in the religious, philosophical, and moral sciences; you will read the human character in all its multifarious descriptions; you will meet it in all its varieties, and detect it in all its hypocrisies. This may not be a very pleasing task, bnt, to an advocate, it is a very necessary power.

The religious, like the civil part of the legal institutions of this country, is connected with those of other countries; occasions, therefore, sometimes occur, in which the latter may, with great beauty and propriety, be introduced to corroborate and enforce arguments that arise from any legal discussion of the former: hence the necessity at which I have just now hinted of extending our researches beyond the boundaries wherewith a fondness for our native country or a regard for the present age may surround us. And this

practice is sanctioned in a peculiar manner by the examples of all those great men who have left behind them the noblest monuments of learning and of wisdom: they overcame prejudices; they attacked and examined, without fear, opinions that had been well received and established in the world, but they attacked not the eternal principle of truth; they considered that it pervaded, without discrimination, other countries and other ages than those in which they lived: hence they naturally drew the inference of its secret and extended influences over the various forms of civil and religious systems by which these were governed: they knew also that humanity has preserved its multiform character, unchanged by the mutations of power or the lapse of ages: they therefore contemplated its works and surveyed its hidden springs in the writings of those who, in whatever country or in whatever age they lived, have gained the applauses of mankind for their learning, their wisdom, and their virtue: by these means they have themselves become the lights and ornaments of that system of which they formed a part. By the same means you may at least attempt to fill up a character of similar honor; and they cannot be more gloriously or usefully exerted than in acquiring a knowledge and in establishing the principles of religion.

Nor is even the common business of the lawyer unfriendly to the serious disquisition: the history of a long law suit may be considered as no contemptible lesson of morality; amidst the sombre train of dusky parchments, Religion sometimes has condescended to rear her holy front. Do you not, in the perusal of these discolored monuments of human prudence, behold the consequence, the inevitable consequence of our most anxious care? What is this history but a tale of race following race in a rapid and melancholy succession of contrivance and industry? The extravagant mortgagor and the parsimonious mortgagee, the crafty buyer and the careless seller, the provident father and the impatient heir, are all gone down to the dust together; and

nothing now remains of their influence or their names to create fear or excite hope, but the legal instruments they have left to their posterity.

Sir James M'Intosh's letters on the Study of the Law.

MR. DUNNING'S* LETTER TO A LAW STUDENT.

Lincoln's Inn, March 3, 1779.

DEAR SIR,

The habit of intercourse in which I have lived with your family, joined to the regard which I entertain for yourself, makes me solicitous, in compliance with your request, to give you some hints concerning the study of the law.

Our profession is generally ridiculed as being dry and uninteresting; but a mind anxious for the discovery of truth and information will be amply gratified for the toil, in investigating the origin and progress of a jurisprudence which has the good of the people for its basis, and the accumulated wisdom and experience of ages for its improvement. Nor is the study itself so intricate as has been imagined; more especially since the labors of some modern writers have given it a more regular and scientific form. Without industry, however, it is impossible to arrive at any eminence in practice; and the man who shall be bold enough to attempt excellence by abilities alone, will soon find himself foiled by many who have inferior understandings, but better attainments. On the other hand the most painful plodder can never arrive at celebrity by mere reading; a man calculated for success, must add to native genius, an instinctive faculty in the discovery and retention of that knowledge only, which can be at once useful and productive.

* Afterwards LORD ASHBURTON.

I imagine that a considerable degree of learning is absolutely necessary. The elder authors frequently wrote in Latin, and the foreign jurists continue the practice to this day. Besides this, classical attainments contribute much to the refinement of the understanding, and the embellishment of the style. The utility of grammar, rhetoric, and logic, are known and felt by every one. Geometry will afford the most apposite examples of close and pointed reasoning; and geography is so very necessary in common life, that there is less credit in knowing, than dishonor in being unacquainted with it. But it is history, and more particularly that of his own country, which will occupy the attention, and attract the regard of the great lawyer. A minute knowledge of the political revolutions and judicial decisions of our predecessors, whether in the more ancient or modern æras of our government, is equally useful and interesting. This will include a narrative of all the material alterations in the Common Law, and the reasons and exigencies on which they were founded.

I would always recommend a diligent attendance on the Courts of Justice, as by that means the practice of them (a circumstance of great moment) will be easily and naturally acquired. Besides this, a much stronger impression will be made on the mind by the statement of the case, and the pleadings of the counsel, than from a cold uninteresting detail of it in a report. But above all, a trial at bar, or a special argument, should never be neglected. As it is usual on these occasions to take notes, a knowledge of short-hand will give such facility to your labors, as to enable you to follow the most rapid speaker with certainty and precision. Common-place books are convenient and useful; and as they are generally lettered, a reference may be had to them in a moment. It is usual to acquire some insight into real business, under an eminent Special Pleader, previous to actual practice at the bar: this idea I beg leave strongly to

second; and indeed I have known but a few great men who have not possessed this advantage.

I here subjoin a list of books necessary for your perusal and instruction, to which I have added some remarks; and wishing that you may add to a successful practice, that integrity which can alone make you worthy of it,

I remain, &c. &c.

JOHN DUNNING.

Read Hume's History of England; particularly observing the rise, progress, and declension of the feudal system. Minutely attend to the Saxon government that preceded it, and dwell on the reigns of Edward I.—Henry VI.—Henry VII.—Henry VIII.—James I.—Charles I.—Charles II. and James II.

Blackstone. On the second reading turn to the references.

Mr. Justice Wright's learned Treatise on Tenures.

Coke upon Littleton, especially every word of Fee-Simple, Fee-Tail, and Tenant in Tail.

Coke's Institutes; more particulary the 1st and 2d—and Serjeant Hawkin's Compendium.

Coke's Reports.—Plowden's Commentary.—Bacon's Abridgment; and First Principles of Equity.—Pigott on Fines.—Reports of Croke, Burrow, Raymond, Saunders, Strange, and Peere Williams.—Paley's Maxims.—Lord Bacon's Elements of the Common Law.

LORD MANSFIELD TO MR. DRUMMOND.

For general Ethics, which are the foundation of all Law, read Xenophon's Memorabilia, Tully's Offices, and Woolaston's Religion of Nature. You may likewise look into Aristotle's Ethics, which you will not like; but it is one of those books, *qui a limine salutandi sunt ne verba nobis dentru.*

For the law of nations, which is partly founded on the law of nature, and partly positive, read Grotius, and Puffendorf in Barbeyrac's translation, and Burlamaqui's Droit Naturel: as these authors treat the same subjects in the heads, they may be read and compared together.

When you have laid this foundation, it will be time to look into those systems of positive law that have prevailed in their turn. You will begin, of course, with the Roman Law; for the history of which, read Gravina's elegant work *De Ortu et Progressu Juris Civilis;* then read and study Justinian's Institutes; without any other comment than the short one by Vinnius. Long comments would only confound you and make your head spin round. Dip occasionally into the Pandects. After this, it will be proper to acquire a general idea of feudal law and the feudal system, which is so interwoven with almost every constitution in Europe, that, without some knowledge of it, it is impossible to understand Modern History. Read Craig De Feudis, an admirable book for matter and method; and dip occasionally into the Corpus Juris Feudalis, whilst you are reading Giannone's History of Naples, one of the ablest and most instructive books that ever was written. These writers are not sufficient to give you a thorough knowledge of the subjects they treat of; but they will give you general notions, general leading principles, and lay the best foundation that can be laid for the study of any municipal law, such as the Law of England, Scotland, France, &c. &c.

LAWS AND CUSTOMS OF THE HINDOOS.*

FROM FORBES'S ORIENTAL MEMOIRS.

A short time before Mr. Forbes was appointed to fix his situation at Baroche, some Musselmen walking through a village where a family of Raghpoots resided, accidentally looked into a room where an elderly woman was eating; no insult was intended, they merely saw her at her meal, and retired; but this was a disgrace for which there could be no expiation. She lived with her grandson, a high-minded young man; he happened to be absent: on his return she told him what had passed, declared that she could not survive the circumstance, and entreated him to put her to death. He reasoned with her calmly, his affection making him see the matter in its proper light: none but her own family, he said, knew the disgrace, and the very men who occasioned it were unconscious of what they had done. She waited till he went out again, and then fractured her skull by beating it against the wall! The young man found her in this state, but alive and in her senses; she implored him to finish the sacrifice which she had not strength to accomplish, and release her from her sufferings;—and he then stabbed her to the heart. Shocking as this is, the most painful part of the story is to come. The parties were English subjects; by the English laws the young man's act was murder; he was arrested, sent to Bombay for trial, and confined with common prisoners till the ensuing sessions; a true bill was found against him: the jury, consisting half of Europeans and half of natives, brought him in guilty, and the Judge condemned him to death.

'The Raghpoots in general have a noble mien and dignified character; their high cast is stamped in their counte-

* Quarterly Review.

nances; the young man possessed them all. I saw him,' says Mr. Forbes, 'receive his sentence, not only with composure, but with a mingled look of disdain and delight not easy to describe. Unconscious of the *crime* laid to his charge, he said he had nothing to accuse himself of but disobedience to his parent in the first instance, by permitting humanity and filial affection to supercede his duty and the honor of his cast;—that life was no longer desirable to him, nor, if acquitted by the English laws, could he survive the ignominy of having been confined with European culprits and criminals of the lowest casts, with whom he had been compelled to eat and associate in a common prison;—a pollution after which the sooner he was transferred to another state of existence the better. However inclined the government might be to clemency, it would evidently have been fruitless: the noble Raghpoot would not survive the disgrace, and the sentence of the law was executed, in the hope that it might prevent others from following his example.'

Useless as clemency would have been, it may be doubted whether the government was justifiable in inflicting death in this case—it cannot be doubted that it was most unjustifiable in inflicting the previous disgrace.

A Hindoo devotee, a man of amiable character, in the prime of life, married, and the father of four young children, who lived near Bombay, desired his wife one afternoon to prepare herself and her children for a walk on the beach, from whence, he said, he intended to accompany them on a longer journey; she inquired whither, and he informed her that his God had invited him to heaven, and to take his family with him; that they were to go by water, and set out from Back-bay. Perfectly satisfied with this explanation, the wife proceeded with her children to the sacrifice. The parents drove the two eldest children into the sea, and they were carried off by the waves; they then drowned the two younger who were infants; the wife walked in and perished,

and the husband was deliberately following her, when he suddenly recollected that the disappearance of a whole family would occasion inquiry from the English government, and might involve his neighbors in some trouble; so he determined to step back and inform them of the circumstance before he completed the sacrifice. His Hindoo neighbors heard the story with their characteristic insensibility, and perhaps admired the act: but a Mussulman was present, and he observed that the story was so extraordinary, that it might be difficult to convince the government of the truth, and therefore the husband must accompany him to a magistrate, and relate the facts himself. In consequence, the enthusiast was tried, condemned, and executed for murder; a sentence with which he was perfectly satisfied, and only regretted that it occasioned an unpleasant delay in his passing to that heaven, which he promised himself as his reward. In this case, also, the wisdom of the sentence may be questioned. The man, according to his belief, his laws, and his religion, had committed nothing wrong: he neither considered that act as a crime, nor death as a punishment. It is assuredly the duty of the British government to deter its idolatrous subjects, as far as lies in its power, from such abominable acts. Imprisonment or transportation might be efficacious where death would not; and might also afford opportunity for conversion. About half a century ago a most mischievous religious madness broke out in Denmark, which, like all other religious madnesses, was highly infectious. The persons who were influenced by it believed that they should ensure their own salvation by committing murder and suffering death; and that they might avoid the danger of sending any soul out of the world in an unprepared state, they selected children for their victims. Such madmen were not to be deterred by capital punishment, death being what they sought,—they were therefore sentenced to perpetual imprisonment, and this put a stop to the phrenzy.

In no country has superstition grown out into such distortions and deformities as in Hindostan; the monstrous forms of its idols are proper types of the extravagant and senseless ceremonies with which they are worshipped. A Brahmin will sometimes devote himself to death by eating till he expires with repletion! Another will make a vow of swallowing a certain quantity of clarified butter, and rolls upon the ground in agony till nature relieves him of the load. Some never eat any thing but grain which has passed through a cow, and been picked out from its excrement, holding this to be the purest of all food! Others live wholly upon milk, and, that their exalted natures may not be defiled by the ordinary process, affect to bring up all that is not convertible into chyle, by means of a small string of cotton, somewhat in the manner that Spallanzani made experiments upon himself and his unfortunate buzzard. The torments which devotees, in this benighted country, inflict upon themselves, are well known;—they differ more in fashion than in principle, from the practices which have entitled so many European fanatics to a place in the Romish Calendar. It is known, also, how the Brahminical system produces the utmost excesses of false humanity and of hideous cruelty. They who use force to keep the widow upon the pile which she would fain escape,—they who teach the mother to expose her infant to the ants and vultures, and the children to accelerate the death of their aged parents by forcing them into the river, or stopping their mouths and nostrils with mud;—they who grind in oil-mills the priests of a rival idolatry, and who pour boiling oil in the ears of the Sudra, who has been unlucky enough to hear their scriptures,—hold it a crime to destroy the insect that bites them! Some carry a light broom to sweep the ground before them, lest they should unwittingly crush any thing that has life, and others wear a cloth before their mouths lest they should draw in an insect with their breath. That part of the Banian hospital at Surat, where animals, when worn out in the service of man, or disabled by

any accidental hurt, are provided with food and suffered to die in peace, may make an Englishman feel shame for his country, when he recollects the facts which were stated by Lord Erskine before the British Parliament;—but those wards which are appropriated to the most loathsome vermin, and where beggars are hired by the night to serve as food for them, make us blush for human nature.

This superstitious reverence for life in the lowest stages of existence, is instanced in one of the most interesting anecdotes in the work before us. A Brahmin, far beyond his brethren both in powers of mind and extent of knowledge, lived in habits of great intimacy with an Englishman who was fond of natural and experimental philosophy; the Brahmin, who had learned English, read the books of his friend, searched into the Cyclopædia, and profited by his philosophical instruments. It happened that the Englishman received a good solar microscope from Europe; he displayed its wonders with delight to the astonishment of the Brahmin; and convinced him by the undeniable evidence of his senses, that he and his countrymen who abstained so scrupulously from any thing which had life, devoured innumerable animalculæ upon every vegetable which they ate. The Brahmin, instead of being delighted as his new friend had expected, became unusually thoughtful, and at length retired in silence. On his next visit he requested the gentleman would sell him the microscope: to this it was replied, that the thing was a present from a friend in Europe, and not to be replaced; the Brahmin, however, was not discouraged by the refusal; he offered a very large sum of money, or an Indian commodity of equal value, and at length the gentleman, weary of resisting his importunities, or unwilling longer to resist them, gave him the microscope. The eyes of the Hindoo flashed with joy, he seized the instrument, hastened from the viranda, caught up a large stone, laid the microscope upon one of the steps, and in an instant smashed it to

pieces. Having done this he said in reply to the angry reproaches of his friend, that when he was cool he would pay him a visit and explain his reasons. Upon that visit he thus addressed his friend .—

'Oh that I had remained in that happy state of ignorance in which you found me! Yet I confess, that as my knowledge increased so did my pleasure, till I beheld the wonders of the microscope; from that moment I have been tormented by doubts,—I am miserable, and must continue to be so till I enter upon another stage of existence. I am a solitary individual among fifty millions of people, all brought up in the same belief as myself, and all happy in their ignorance. I will keep the secret within my own bosom, it will destroy my peace, but I shall have some satisfaction in knowing that I alone feel those doubts which, had I not destroyed the instrument, might have been communicated to others, and rendered thousands wretched. Forgive me, my friend—and bring here no more implements of knowledge!'

This is a fine story; but how much finer might it have been if the European had been a Christian philosopher, as well as an experimentalist!

"I have been asked (says Mr. Forbes) by one of the most amiable men I know, and one of the most valuable friends I ever possessed, why I trouble myself so much about the Hindoos: why not allow mothers to destroy their infants, widows to immolate themselves with their husbands, and Brahmins to pour boiling oil into the ears of the lower casts who hear the Shastan? This gentleman lived upwards of twenty years in India, and, like many others, saw no impropriety in such conduct; or he would have been among the first to reprobate it, and attempt a change. But as I know he speaks the sentiments of numerous phi-

lanthropists, I shall answer the question in the language of the excellent Cowper.'

"I was born of woman, and drew milk,
As sweet as charity, from human breasts.
I think, articulate, I laugh and weep,
And exercise all functions of a man.
How then should I, and any man that lives,
Be strangers to each other?"

IRISH ELOQUENCE.

At a Catholic Meeting in Dublin where the Earl of Fingal presided, after the reading of some resolutions, there was a general call for Mr. Finlay, who rose amidst loud acclamations.

MR. FINLAY.——I should be very insensible, if I were not deeply impressed, by the loud and lengthened expression of approbation, with which your partiality induces you to greet the humblest of your advocates, but one who is influenced with a sincere anxiety to rank himself amongst the most zealous of your friends—I should be very insensible, my Lord, if I could not appreciate the honor, of which a high man might be proud—the honor which I this moment feel, when I stand in the presence, and hold the attention of the pure minded head of the House of Plunket—that illustrious House—that *ancient* House—whose noble progenitors were gloriously employed in leading armies, and guiding states, for centuries ere the founders of those late sprung Peers (who consider you as unworthy of your seat among them) had started from the herd of the vulgar in either Island.

The Catholic Delegates, and the Catholic Board, having discharged their duty abroad and at home, with much credit to themselves—with much benefit to their country, have now resigned their trust into the hands of the People. That

Board having performed its difficult journey under misrepresentation, slander, and unexampled persecution,—that Board so *formidable*—so alarming—so frightful to some of your friends—has now calmly and quietly dissolved itself, into the elements from which it grew, and your Lordship is, at this moment, the only authority recognized by your suffering brethren.

In the long column of obligations, which the Catholics of Ireland owe, and acknowledge to your Lordship's prudence and patrictism, there is, perhaps, no item more important, than the debt which you have imposed by your careful, and successful nurture of that rich blossom—that "bright promise of the young year"—that amiable youth, whose feeling effusion has delighted—affected—and melted the hearts of this audience in love and tenderness to the Son and Father.

Your son, my Lord, is what he ought to be—The Lord Killeen is called by his birth to take a high station among the rising race—great and serious duties may await him—he justifies our hopes—he starts for his country.

His education was a public question—and you have shaped it to the public good—it has been shaped with wisdom, foresight, and precaution. You did not send him to an English College, where he might dissolve his amiable and valuable partialities to Ireland—you did not send him to complete his acquirements in an Irish Catholic Seminary, whereby his enemies might take occasion to impute to him, that his mind took a tincture from a monastic institution. You provided against the accident of the possible mischief and the possible slander—you sent him to seek instruction in the liberal and learned seminaries of Caledonia, the nurse of Arts, the seat of Science, the Athens of our Empire, the country of Toleration, where there is neither bigotry nor ignorance. He has reaped instruction—he has escaped depravity—he may have lost prejudices there, but he could not lose patriotism.

The Englishman cannot say, that he was bred in bigotry to his faith—the Irishman cannot say, that he is denationalized by his education.

As you have preserved him from the contagion of the mushroom, stupid, vicious Lordlings of the day, may he, through life, resemble *you;* and after he has succeeded to your public station, and after his substitution gives you an opportunity to retire to the tranquillity of private life, may he support to your satisfaction, the honor of your house, the glory of your name—and I feel that I am but expressing the anxious wish of every Irishman, when I pray, that through the season of your political retirement you may long and happily enjoy the health and honors of a green old age, resting like Hercules on the pillar that you reared.

Catholics,—I have to give you joy on the progress of your cause—it has been reviled in its beginning as mean and contemptible—be it so—if the instruments of its late revival deserve to be undervalued, and with the exception of myself, I am bound to think otherwise, but admitting the truth of the unworthy imputation, it cannot be denied that its progress is uncommon. Like the grain of mustard seed, mentioned in the Scripture, it has expanded "into a tall and spreading tree"—it has gone onwards, strengthening from "strong to stronger," evincing the value of the great maxim, that Truth is mighty and must prevail.

Many of its former opponents are its presents friends. Its late involuntary adversaries have espoused the cause, and its late determined enemies are compelled to confess their inability to resist it.

The persuasion of its advocates, and the peril of the empire, combined to conduct it to its grand consummation.—Moral and political causes united—but two obstacles impeded its advancement, which neither moral nor political causes could remove—the *principles* of a Minister, and the

conscience of a King. The Minister said it was resisted by his *reason*—the King declared it was resisted by his *morality*. The King was *religious*—the Bigots were *obstinate*. Bigotry in this case, as in all cases, adopted the pretences of religion to counteract the purposes of religion. The Bigots of the day beset the monarch—they said to themselves, in the language of the great Poet—they said to themselves,

> ——————————" The oath's the thing,
> " In which we'll catch the conscience of the King."

In this way they succeeded in convincing the Sovereign, that concession to you must be perjury in him. Thus the semblance of religion, and the substance of bigotry united to oppose the free worship of God.

Against these two uncommon obstacles, moral and political causes worked in vain—in vain would reason expostulate with bigotry—in vain would it argue with religious conscientiousness. Reason could do nothing with the one or the other—secondary causes must fail to remove such obstacles —human causes could not remove them—Man could not move—none but God could remove them. God has removed them.

By the two severest visitations with which man can be afflicted—by the loss of *reason* and the loss of *life*—these two impediments to your emancipation have been dislodged—your King no longer ranks with the rational, and the minister of that King is now numbered with the dead.

It is not for us, humble, feeble mortals, to question or arraign the decision of Omniscience. Let us rather bow in awful acquiescence to the inscrutable mandates of that all-wise Being, who is accustomed to convert instant evil into the means of future good.

As a subject and a man, I must, in common with you all, sincerely deplore this two-fold affliction; but as a moralist

and a christian, I may be permitted to infer, that these "awful signs of the times,' may appear to the eye of the unborn historian, but as "the distinct evidence of a controling Providence." That for the future, man's free worship of his Creator is as it were written by "the finger of God"—and that it now stands a record in Heaven, that the time is past and never can return, when any man, or any set of men, can presume to rebuke, by any system of social or civil vilification, that great majority of the Christian Church, who bend the knee in the name of Jesus.

In the interval between these two melancholy dispensations—before we were yet taught to despair of our sovereign's recovery—and before the family of the minister had to lament the loss of a tender husband and a tender father—in that interval a new incident occurred to increase your difficulties and damp your hopes. An accident on which no one calculated, because it was one which no one could foresee—it was rumored that the Regent was *neutral* in your interests.

For the last thirty years, Irishmen had been educated in a reverential love for that illustrious personage. Hope, encouraged hope, had sublimed our duty into a chivalrous attachment. It was not mere loyalty—it was more than loyalty—it was loyalty and sentiment together—created by affection—cherished by expectation—suggested by reason to the old—conveyed by inheritance to the young—sanctioned by experience—confirmed by time. "Sure never Prince was loved as he was."

The mind of an Irishman is formed of soft materials—it takes impression—it melts in kindness. The Irishman is prodigal of eulogy and gratitude. The praise of his Prince ran riot on his tongue—the image of that Prince was carried in his heart. No Journal in Ireland dare asperse his character—no Catholic in Ireland who would not resent a dis-

respect offered to his Prince, as he would an insult offered to his sister. The affections of the country were strung upon him—and their public anxieties centered in his safety.

We must remember the time, for it is not remote, when Ireland was alarmed by the rumor of the Regent's ill health. The public anxiety was then so uncommon, that strangers accosted each other in the streets, and the devotee, on his knees, in the house of worship, interrupted his prayers to inquire from his neighbor, if the Prince was better—and when he received a favorable reply, he smiled in piety, and thanked his God.

When the rumor reached us, that our Prince was neutral to the Catholic—it was laughed at, as the "weak invention of the enemy." We disbelieved. How could we believe it? Our reason nurtured our incredulity. Could we believe, that modes of thinking, habits of converse, fruits of instruction, impressions of education, could vanish—instantly vanish—and leave no trace behind; that impressions deepening in the human mind for the third portion of a century, could instantly be effaced without a cause. True it was, that Fox was in the grave—irreparable misfortune to Prince and people! But is it the nature of instruction to die with the instructor? No—the idea is repugnant to all moral and physical analogy—to the course of nature and the order of things. If the hand of Omniscience should extinguish the sun in the centre of our system, this world would, for a considerable time, continue in light. In truth, my Lord, there has been, and must be, an eternal survivorship of effects beyond the duration of their creating causes—and this grand eternal principle was a sufficient reason to the intelligent Catholic for disbelieving that his Prince could be instantly altered—and for believing, that the mind of any man which possessed the unaccountable and unnatural elasticity of quickly rejecting its ancient impressions, and making its established old opinions immediately evanescent, could not appear to the thinking man any thing short of a *moral miracle*.

The melancholy truth at last baffled all our sceptiscism, and the frightful reality flashed upon the mind like the surprise and shock of a stroke of thunder.

" O God, is it come to this ?" they cried—Is hope, that " last medicine of the miserable," denied ? And shall not the stream of bounty flow from the Throne ? And have we amused our expectations with an unreal mockery, in supposing, that the era was just arrived, when the delegates of emancipated millions might be permitted to surround the throne, and say to our Prince—Sire, you have bound your Catholic subjects in the strong ties of lasting gratitude—we are ready to repay your justice with our blood. Whenever the honor or interests of your realms are threatened or endangered, assure yourself that a valorous, devoted, unmercenary army lies cantoned through the cottages of your Catholic subjects. Melancholy reverse !—to behold our Royal Favorite, in a few short months, receiving that minister whom he had so lately rebuked for measures uncongenial to the interests of the common weal—to see that minister levelling his libel against our Prince's character, and becoming the maker of his ministry, under the threat of becoming the defamer of his reputation—to see that minister ascribing our Prince's name to a recanting, illiterate, ungrammatical declaration—that name which was never before undersigned to any article that has not stood and must not stand, as an " Elegant Extract" to future compilers of the beauties of our language—a rich sample of constitutional principle and British literature.

Melancholy reverse—afflicting to you—to see your Prince receding from those friends who stood by his cause and shielded his character, when reward was remote and defamation incessant—men, who served him with fidelity and sacrifice, when they had little to expect—when he had nothing to bestow—when their faithful and lasting attachments could be influenced by no motive, but the rich remuneration

of their Prince's esteem. Melancholy reverse—afflicting to you—to see him receding from friends who had no interests but his, and resorting to flatterers, who have no interests but their own.

At a meeting of the Dublin Library the following Address (drawn by Charles Phillips) to the Master of the Rolls, on his election to the Presidency of that Institution, was unanimously agreed to.

To the Right Hon. JOHN P. CURRAN, Master of the Rolls.

SIR,—The death of Mr. Kirwan having rendered vacant the Chair of our Institution, we proceeded to the very difficult duty of selecting his successor.

Our arduous object was to discover a name, which united the purest principles, with the most brilliant genius; which adversity had proved, patriotism endeared, and years made venerable—A name which was of native growth, and carried in its very sound the conviction of its value—which taught purity, while it inspired pride, and shamed the venal, while it gladdened the virtuous. A name, of which in our best times we had been familiarly vain, and which in our worst, like an orphan pledge, had been fondled by the feelings of the country.

Such were the rare qualities we sought; and do not ascribe to flattery, what you have won by merit, when we boast their discovery in the name of Curran.

We solicit you, then, Sir, in the name of our Institution, by accepting its Chair, to give us our only atonement for the loss of Kirwan.

The deputation appointed to wait on Mr. Curran, reported his answer to a general meeting on the 29th of June.

ANSWER.

Be pleased to accept my most grateful acknowledgment of the honor you confer upon me in the offer of that Chair, which was so splendidly filled by our illustrious and lamented countryman. I cannot but most highly value such a mark of favor from so respectable a body of my fellow-citizens.

It would be an unworthy affectation were I to say, that the gratification which I feel in accepting this offer, was in any degree diminished by the reflection, that a sort of comparison may be suggested, in which I could not have even the consolation of thinking, that the victory under which so unequal a competitor must sink, could add any thing to the credit of so honored a predecessor: I know the gifts which he has conferred upon science, and the glory which he has bequeathed to Ireland, in a name which cannot be involved in the mortality of his person, but must live forever. But I cannot think myself humiliated by the consciousness of individual disparity, while I feel that I am an Irishman, and as such, am raised in participating the honor of my country.

A long and intimate friendship with Mr. Kirwan gave me the opportunity of knowing how he felt and thought on such subjects as I was capable of discussing with him. As a man, his heart was exalted above every vulgar prejudice, and every interested antipathy—it was enamoured with liberty, and recoiled from thraldom. As a philosopher, he saw that servitude was a condition befitting no human being but him who was vile enough to inflict or to endure it. I can assume but little praise to myself in venturing to hope, that such facilities of communication were not utterly lost upon me—and that the high and manly tone of spirit, in which he took an interest in the various and wayward destinies of Ireland, could not fail of making some impression upon me; to your

kind belief that this may have been the case, and to that alone, I attribute your election of me to succeed him: because in that point only you could have hoped, that in my succession he would not be altogether unrepresented.

The time has not long passed away, in which I should have been unwilling to allude to my attachment to our common country: but in this happier period of patriotic liberality, thank God, there is nothing rare or peculiar in the sentiment; and every man may freely profess it, without incurring the charge of egotism or vanity.

Shall I presume to advert to the over-measure of commendation which your kindness has led you to use to myself? I should be mortified if you could suspect that while I felt the kindness I did not also look farther to the motive of such disproportioned approbation. It is wise and politic to reward even the most barren good intention beyond the exact limits of its claim—and perhaps it belongs peculiarly to the nature of the Irish heart, that it may be generous and even prodigal, without any risk of impoverishment.

On the answer being read, Charles Phillips spoke as follows:

"Allow me, Sir, to second this motion, and to trespass on your time for a few moments. I should be deficient in gratitude, if I did not return you my sincere thanks for the flattering manner in which you have received my very humble address. It was drawn up mid the confusion of the ballot, and, as my friends know, with very little previous notice—its unworthiness carries with it, however, at least this alleviation, that it mattered but little, whether it was maturely considered, or hastily sketched, it must have proved quite inadequate to the merits of the great man who forms its subject. He who composed an address on this occasion, had a double difficulty to encounter—the one arising from pride for him we had elected—the other from grief for

him we had lost! A loss, indeed, not only to individuals, but to science—not only to our institution but to the country—not only to our country but to the universe. He was one of those splendid prodigies which occasionally arise in our system, as it were, to vindicate the dignity of the species—created, one would imagine, by the hand of the Almighty God, for the purpose of confounding the speculations of the Atheist and the Blasphemer, by proving that even here our mortal nature may be sublimed into the semblance of inspired wisdom, and that there is a spirit within us which can emerge from our infirmities, and almost associate us with perfection! It is our boast to have lived with him—he has been a favor conferred upon our age. Such men as Kirwan are the offspring of centuries. Nature seems to put forth her whole energies in their formation, and to sink exhausted by the immensity of the effort. To follow him through the range of his discoveries, would require an intellect like his own. Few are the Arts that he has not enriched!—Many are the Sciences that mourn him!—Whether he was employed in developing the properties of matter, or in explaining the intricacies of mind, his powers seemed to be magical—almost miraculous. Error fell before him, and, at his bidding, like that of the Sage, in Holy Writ, even the barren rock became a fountain of fertility!—He illustrated the image of an expressive author: "his reason strode upon the mountain tops, and made for itself a plain of *continued elevations*." I have heard with sorrow some calculations made, as to the propriety of erecting his bust—a bust of Kirwan!—Why, it is a debt due not to him, but to ourselves—a tribute not to his name, but of our gratitude. Until nature perishes, he cannot want a monument—and the treasures she has poured forth at his command, are so many immutable inscriptions to his memory. But the theme is melancholy—Kirwan has left us, but not alone—no, no, not alone. Even while she mourns over his new-made grave, Genius lifts her head, and smiles in tears on his Successor.

Happy, happy, Ireland!—happy amid all your miseries—man cannot take away what God has given, and it is not in the power of all the despots in creation to wring from you the pride of retrieving such a loss, by such a reparation.—This transition from the tombs to the name of Curran, seems like rising from death to the prospect of immortality. And immortal he must be, if talents, direct from Heaven, exerted in the highest interests of earth, can constitute a claim to immortality. 'Mid the race of reptiles which our fall has generated, whom we see coiling round the broken columns of our state, and winding themselves into a loathsome and disgusting elevation, I cannot help looking upon this man as I would upon some noble statue 'mid the ruins of antiquity—a sacred relic of departed worth—a silent memorial of the virtue that has been. But it is not in my feeble tongue to do him justice—no, nor is it in the malice of his enemies to do him injury. He has the reward and antidote within himself—he has it in the sight of a people consecrating his old age. And, in my mind, Sir, if there be one reward on earth superior to another, 'tis the applause of our country, and the consciousness of deserving it—a reward richer than all the baubles in the power of Majesty to bestow—brighter than the star upon the Despot's breast—purer than the gems of the Imperial Diadem!—Sir, I have trespassed on your time—you will, I feel, excuse me; but these few remarks have been unavoidably extorted, lest, after having paid my poor tribute to living merit, I should appear ungratefully forgetful of the illustrious dead."

ADJUDGED CASES

IN THE

SUPREME COURT OF NORTH-CAROLINA.

JULY TERM 1815.

Smith v. *Walker's Executors.*

This was an action of debt *qui tam*, under the statute of usury, brought against Walker in his life time; and upon the return of a *sci. fa.* to revive it against his executors, they pleaded specially that the action being founded in *maleficio*, and unaccompanied with a duty, did not survive against them. To this plea there was a demurrer, which was overruled in Brunswick Superior Court, from whose judgment the plaintiff appealed to this Court.

No argument was made on the case.

TAYLOR, C. J. delivered the judgment of the Court.

The common law principle, relative to the abatement of suits by the death of the parties, has undergone such a variety of legislative alterations, that some attention is necessary to mark with precision what actions will now survive against personal representatives.

It was once doubtful, whether, from the general terms in which the maxim is expressed, the action of assumpsit did not come within its operation; because its form was trespass on the case, which imputed a wrong, and its substance was to recover damages in satisfaction of the wrong. But when, after much discussion, this doubt was removed, on the principle that the testator's property had received a wrong,

and that he consequently gained an interest, we are furnished with the plain and intelligible restriction of the rule, to all cases where the declaration imputes a hurt done to the person or property of another, and the plea is not guilty; thus including every case where the cause of action arose *ex delicto*. But all actions survived that were founded on any contract or duty to be performed, excepting the action of account, and the action of debt on simple contract, to which the law wager was attached. The first, because the account rested in the privity of the testator; the other, because the executor would lose the benefit of the law wager.

The first relaxation of the rule, now necessary to be noticed, was made by the statute 4 *Ed.* 3, *C.* 7, which gave to executors an action of trespass for taking away goods, in the life-time of the testator; and this remedy was extended to executors of executors by statute of 25 *Ed.* 3, *C.* 5, and to administrators by 31 *Ed.* 3, *C.* 11. Although the first statute makes use of the word *trespasses* only, yet a series of adjudications under it, made in a spirit of liberal interpretation, have produced the rule, that an executor or administrator may prosecute the same actions for an injury done to the personal estate of the testator or intestate, in his life time, whereby it is become less valuable, that the testator or intestate himself might have done. Notwithstanding these statutes, the common law maxim operates with full force, in England, with respect to the person by whom the injury is committed; for, if he dies, no action arising *ex delicto*, where the plea is not guilty, can be brought against his executor or administrator—though, for taking away goods, a remedy may be had against them in another form.

The act of 1799 enumerates the actions of *trover*, *detinue* and *trespass*, where property either real or personal is in contest, and the action is not merely vindictive; and provides that they shall not be abated by the death of either party. With respect to the action of *detinue*, the

act was unnecessary; because that action might have been brought before, either by, or against an executor, to recover goods in the hands of the wrong doer or his executor.—*Sir Wm. Jones* 173. The actions of *trover* and *trespass* might both have been brought by an executor, under the construction of 4 *Ed.* 3; so that all the operation of this act is, to enable them to survive against executors, and to prevent the action of *trespass* from abating by the death of either party, where real property is in contest.

The act of 1805 extends a similar provision to the actions of *trespass vi et armis*, and *trespass on the case*, brought to recover damages done to property either real or personal.

The same equitable construction given to these acts of Assembly, which has heretofore been put upon the antient statutes, will permit not only all actions to be brought by, or revived against, executors or administrators, which might formerly have been brought by them, but likewise other actions which are embraced by the more comprehensive words of the acts. The common law maxim still applies to injuries done to the person, and to all others which are in the nature of crimes, and consequently to all actions upon penal statutes, relative to acts arising *ex maleficio*, and where no right or duty is vested in the plaintiff. Wherever a duty is so vested in the plaintiff, it is probable that the true construction of our acts of Assembly, would sustain even a penal action against executors, as it has been held in England, under the statute of *Ed.* 3, that an action of debt will lie by executors, for not setting out tithes. The statute, however, which authorises such action, gives the penalty to the party grieved; and the tithes which ought to have been set out, were a vested right in the testator. The present suit is brought for an offence, and the penalty is given, in part, to any one who will sue for it—We are therefore of opinion, that it is not one of those cases, which the acts of Assembly meant to provide for; and that the crime is buried with the defendants' testator. Let there be judgment for the defendants.

Porter v. *Wood.*

This was an appeal from the decision of Edgecomb Superior Court, awarding a new trial to the plaintiff, upon an affidavit which stated in substance, that he had instituted this action against the defendant, for neglect of duty as a constable, whereby the plaintiff had lost the amount of a judgment recovered by him, before a magistrate, against Lawrence. That upon two trials in the county court, he offered the judgment of the magistrate as evidence of the amount of damage, which was received without exception—the defence being rested on an alleged misconception of the action—whence he believed it would not be necessary for him to provide evidence to prove the amount of the judgment in the Superior Court; that he was unprepared to do this, when the exception was taken, though he can do it by the next term; and that the same counsel defended in both Courts.

TAYLOR, C. J. It was an essential part of the plaintiff's evidence to prove his account against Lawrence, yet no witness attended for that purpose, nor does any appear to have been summoned. After so many trials, to grant a new one, that the plaintiff may prepare his case, and do that, which ought to have been done from the time the pleas were entered, does not seem to be proper, from any reasons laid before us.

Motion for a new trial overruled.

Ray v. *Simpson*.

The defendant died between Spring Term, 1814, and Fall Term, 1814.—at which last mentioned term his death was suggested of record.

On the first day of this present term (say Spring, 1815,) the plaintiff served on the guardian of the heirs at law of Simpson (he having died intestate) a copy of the declaration in ejectment, with notice to appear and defend the suit.

It is referred to the Supreme Court to decide, whether such service prevents the abatement of the suit?

TAYLOR, C. J. There can be no doubt of the sufficiency of this service, under the act of 1799, *C.* 8—the words of which are, that no action of ejectment shall abate by the death of the defendant, but the same may be revived by serving on the guardian within two terms after his decease a copy of the declaration, with notice to appear and defend the suit; and after such service the suit shall stand revived. This is in the case where the heirs are infants as they are here.—Now this service was made within the second term after the death of the defendant, and is consequently within time.

Dark v. *Marsh*.

This was an action of debt to recover the penalty under the 4th section of the act of 1791, against harboring slaves. The declaration contained three counts. 1. For enticing and persuading the slave to leave the plaintiff's service. 2. For harboring and maintaining the slave, knowing her to be runaway. 3. The same as the second count, with respect to a negro child. The Jury found a vedict for the plaintiff, subject to the opinion of the Court, on the following case.

The plaintiff proved a title to the two slaves, mother and child, under a bill of sale, and possession of them from February, 1807, until the September following, when she absented herself, with her child, in the night time, taking with her all her apparel, and was the next morning in possession of the defendant, who, at that time, gave notice to the plaintiff of the fact, and said he should retain them until recovered by law; as he claimed them as his father's property. The defendant has had them in possesson till 1813, harboring and maintaining them, but in an open and avowed manner, the woman being the wife of one of his negro men. The plaintiff sued out a writ of detinue for the slaves in 1807, and in September 1813, recovered them, and damages for the detention. The writ in the present action was sued out in 1809.

SEAWELL, J. delivered the judgment of the Court.

The Jury have found for the defendant on all the counts in the declaration, except the one for *harboring* and *maintaining* the slave as a runaway: Upon that count we think there can be no doubt as to what verdict they should have found, under the facts which form the case. The act of Assembly gives a penalty, where any person shall "harbour or maintain, under any pretence whatever, any runaway servant or slave." Now, it has been contended by the plaintiff's counsel, that if the slave was runaway, and was in the possession of defendant, and retained by him, that it was then such a case as was provided for by the act, which, from the words, "under any pretence," would reach every possible case. That the Legislature was competent to give a penalty in such case, we do not deny, but feel warranted in saying they have neither *said* so, or *intended* it, in this case.

The act has in *express* words given a penalty for *harbouring*;—harbouring is a term well understood in our law, and means a *fraudulent* concealment—and the Legislature not having said in what *a maintaining under any pretence* consists, we are left to find it out by construction.

To us it seems clear, that it is a safe rule in construction, where acts of a known and definite meaning are described as constituting an offence, and then other words of a general nature are used as synonimous with the former, and apparently with a view of giving to the act a liberal construction in suppression of the mischief, that these *general* expressions should not render penal by construction, any act which does not partake of the *qualities* of the act *specially* set forth :— Such a construction would lead us to say, that the maintaining, intended by the Legislature, was *secret* and *fraudulent* —this being negatived by the statement of the case, we think the Jury should have found for the defendant on this count, and are all of opinion there should be judgment for defendant.

State v. *Hashaw.*

At September Term 1811, a bill of indictment was found against defendant, and was continued from court to court until September Term, 1814, when a *nol. pros.* was entered in consequence of a defect in bill, and a new bill was found against defendant for same offence, upon which he was tried and convicted.

Question for Supreme Court,—Is the defendant bound to pay the State's witnesses from the finding of the first bill unil the *nol. pros.* was entered ?

TAYLOR, C. J. We think it very clear that the defendant is liable to pay the witnesses for the whole time of attendance. The charge, of which he was convicted, was the same upon which the witnesses attended, and though the indictment was altered in point of form, yet neither the defendant nor the witnesses were discharged during the time ; the latter were subpœnaed or recognized to give evidence against him on a specific charge ; they did so, and he was convicted.

Branch v. *Arrington.*

The only question arising in this case was,—on what principle ought interest to be charged in a guardian's account with his orphan? To establish which, the case was referred to this Court.

Cameron, J. delivered the opinion of the Court.

By the 9th section of the 5th chapter of acts of 1762, the Legislature have enacted, that "every guardian shall annually exhibit his account and state of the profits and disbursements of the estate of such orphan, upon oath." By the 10th section of the same act, they have further enacted, that "where the profits of any orphan's estate shall be more than sufficient to maintain and educate him, or her, the guardian of such orphan shall lend the surplus, and all other sums of money in his hands, belonging to such orphan, upon bond with sufficient securities, to be approved of by the next succeeding court, and to be repaid with interest, which interest, such guardian shall account for annually."

The question arising on the construction of the foregoing sections, is,—whether the guardian is accountable for interest on the accumulated balance of principal and interest annually, after deducting the necessary expences of his ward? A majority of the Court are of opinion, that he is; because, independently of the just claim of the ward, to have the excess of the profits of his estate converted into an active fund, and of the injustice of permitting the guardian to retain the money of his ward, in his own hands, making gains for himself, the act has expressly required him to account for the interest *annually*. By this we understand, that the guardian is not only bound to exhibit the amount of interest which accrues on the debts due his ward, in his annual account, but he is bound to bring such interest into his account, debiting himself with the amount thereof, and forming a

part of the aggregate amount on which the succeeding accumulation of interest is to be estimated. Should the debtors of the ward neglect or refuse to pay the interest due on their bonds at the expiration of the year, the guardian is bound, within a reasonable time, to coerce the payment of the principal and interest, and when recovered to lend the same to some more punctual person.

It is not intended to place such a construction on the act, as will, at all events, compel the guardian to account for, and pay interest, on the balance of principal and interest, at the expiration of each year. We only lay it down, on the general principle resulting from the just and necessary construction of the act, that he shall be chargeable with the interest annually, unless he shews to the satisfaction of the Court, such equitable circumstances as ought, in conscience, to acquit him of his accountability for such interest.

SEAWELL, J. and TAYLOR, C. J. dissented.

Arrington v. *Arrington's Heirs.*

This was a petition for dower out of several tracts of land owned by William Arrington, the deceased, at the time of his marriage, and several others acquired by him afterwards, of which he died seized.

The defendants plead that the widow is barred of her dower by an agreement entered into between her and her husband, whereby she agreed to claim no dower in the lands of which her husband was then, or should afterwards become seized. The deed referred to in the plea, was executed by William Arrington and the petitioner, before marriage, and in contemplation of it: it conveyed to a trustee all the lands which Wm. Arrington then owned, and all which he might thereafter acquire, in trust that he should be permitted to

enjoy them during his life, or sell them if he thought proper; and in failure of his doing so, in trust for the use of such persons as he shall appoint by his will; or if he die intestate, to the use of his children. The deed contained no covenant on the part of the petitioner; nor was it expressed to be in satisfaction or lieu of dower.

TAYLOR, C. J. It is certain that this deed could only operate upon such lands as William Arrington owned at the time of its execution: lands afterwards acquired did not pass under it, however plain the intention of the bargainer and the words of the conveyance. Of the several tracts, therefore, specified in the petition, as purchased after the marriage, the widow is endowable, if the seisin continued in her husband at the time of his death. The plea must, therefore, be overruled and dower assigned according to this principle.

Bizzel v. *Bedient.*

The plaintiff, a resident of this State, sued out an original attachment against the defendant, a resident of New-York, and levied upon monies in the hands of Sutton, who, being summoned, sets forth in his garnishment, that Bedient was discharged under an insolvent act of the State of New-York, and all his property assigned to trustees for the general benefit of his creditors; that the monies in his hands were received by him in virtue of a power of attorney given by the assignees to Skinner in this State, and by Skinner to him —that he does not therefore consider them as the monies of Bedient, but of the assignees.

It was admitted in the case, that although the plaintiff had been a resident in this State from the commencement of the account, yet that it arose from disbursements and other

expences incurred by him as master of Bedient's vessel, in different parts of the world.

TAYLOR, C. J. delivered the opinion of the Court.

We cannot perceive any satisfactory reason why the plaintiff, who resides in this State, should not have a right to recover his debt out of any of his debtor's property found here, which is not bound by a prior lien. If it be objected that the debtor's property, wherever situated, had been previously assigned, by a law of the State of which he was a citizen—that such assignment was for the benefit of all his creditors, and that no one of them, in the event of a deficiency, should recover his whole debt, to the injury of the rest—we answer, let the assignment bind all the citizens of New-York, and let it have full effect even here, when it does not conflict with the rights of our own citizens. Upon all questions arising between persons, resident in New-York, its laws should in justice operate; but they ought not to have *extra* territorial force in binding the rights of residents of this State, who have no share in forming them, and are destitute of the means of ascertaining what they are. A creditor who, availing himself of the laws of his own country, attaches the property of his debtor found in this State, ought not to be turned round to seek payment under an assignment in another State. In one of the latest cases to be found in the books, it is held that a discharge under a foreign bankrupt law, will not bar an action for a debt arising in England, to a creditor residing there also.–1 *East* 6. Though if a debt contracted in a foreign country had also been discharged by the laws of that country, this would have been a discharge every where. The laws of foreign counties must be recognized as binding on personal property in a variety of instances —but the general rule must be taken with the exception of such laws interfering with the rights of our citizens here. Wherever one or the other must yield, our own law is entitled to the preference.–5 *East* 131.

From the numerous decisions which have taken place in England, relative to the operation of their bankrupt laws in the colonies, they are not held to affect *bona fide* creditors there who will not avail themselves of them. The assignees of a bankrupt in England may recover debts due to him in the colonies, in the same manner as if he had made an assignment of his property to them for a valuable consideration. No injustice can proceed from such a system, because the debt is the property of the bankrupt, and is assigned, with his consent, for a valuable consideration; as a subject of, and resident in Great Britain, he gives his implied assent to every legislative act of the country, and, amongst others, to the bankrupt laws. The debtor not being locally resident in England, is not bound, without actual notice, to take cognizance of any legislative or judicial act. If, therefore, without knowing of the disposition of the bankrupt's property, he pays the debt in good faith, either to the bankrupt himself, or to any person in his behalf lawfully empowered, he shall not be accountable to the assignees. If it is recovered from him by judicial proceedings, he shall not be accountable to them.—*Douglas* 169.—3 *Term Rep* 125. And it does not seem to have been doubted, that a foreign creditor is not bound by the bankrupt laws at all, if he recover a judgment *bona fide*, and has legal possession, according to the laws of another country, of any part of the bankrupt's estate.

It is also to be considered, that an insolvent law of this State would not discharge a debt contracted in New-York, to a creditor resident there—this has been decided in their courts there, as appears in several of the books of reports. Upon the whole, we are of opinion, that so much of the money in the garnishee's hands should be condemned, as is sufficient to satisfy the plaintiff's judgment.

Orr v. *McBryde, Sheriff.*

The plaintiff sued out an attachment against N. T. Orr, which was levied in the hands of McBryde, who, upon his garnishment, stated that he levied an execution upon N. T. Orr's property at the suit of the plaintiff, and raised from it the sum of $374 : 7½ above the amount required in the suit.

This sum was condemned in the Superior Court as liable to the plaintiff's attachment, and from that judgment M'Bryde, the garnishee, appealed to this Court.

The case was submitted without argument.

TAYLOR, C. J. delivered the opinion of the Court.

The question presented on this record is,—whether the money in the hands of the sheriff, forming an excess beyond the amount of the execution, is liable to the plaintiff's attachment? We are of opinion that it is liable to be attached, because it was held by the sheriff, not in his official capacity, but in his private character. He was directed by the writ of execution to raise the amount expressed in it, together with the costs, out of N. T. Orr's property, and to return that sum to court for the benefit of the plaintiff in the suit. It has been ruled, that money in a sheriff's hands, raised by him in obedience to a writ, is not attachable; because it would interfere with the rights of others, embarrass, and sometimes render ineffectual, the process of the Court, and produce endless litigation. But a surplus remaining in the sheriff's hands, is the property of the defendant in the suit, who might immediately have demanded and enforced the payment of it; consequently, any of his creditors, in other respects entitled to the benefit of the attachment law, may levy upon it in the hands of the sheriff. The sum in contest is therefore condemned in the hands of McBryde, to satisfy the plaintiff's judgment.

Ballard & others v. *Griffin.*

In this ejectment a special verdict was found, the substance of which is, that S. T. Everitt being seized in fee of the first and second tracts of lands described in the declaration, devised to his only son, and heir at law, as follows:

"I give and bequeath, to my son James Everitt, my manor plantation, and all the lands thereunto belonging, &c. to him and his heirs forever. It is my will and desire, that if my son James should die without heir, lawfully begotten of his body, then all I have given him shall belong to my brother John Everitt, to him and his heirs forever."

That the testator died—and, afterwards, and subsequent to the year 1795, James died intestate and without issue; and that John died, in the lifetime of James, without issue; that the lessors of the plaintiff are the nephews and nieces of S. T. Everitt,—the heirs at law of John Everitt,—and the heirs at law, on the paternal line, of James Everitt. That the fourth tract of land was granted, by the State, to James Everitt, who died seized of all the tracts, leaving a brother and two sisters of the half-blood, of the maternal line, under whom the defendant claims.

Daniel, for the lessors of the plaintiff, cited *Co. Litt.* 18 *b.* 1 *Strange* 277.

Gaston, for defendant, cited *Cro. Jac.* 695.–9 *East* 382.–2 *Ld. Raym.* 830.

TAYLOR, C. J. The material question on which the right decision of this cause depends, is, whether James Everitt took the lands claimed in the declaration, by descent or purchase; for if he took them by descent, the heirs at law on the paternal line, who are the lessors of the plaintiff, are entitled to recover. If, on the other hand, James took them by purchase, his half-brother and sisters of the maternal line,

under whom the defendant claims, are entitled to the inheritance.

We think it very clear that the words of the will create an estate-tail in James Everit; for, although the first clause gives a fee, yet by the second, it is narrowed and restricted to an estate tail. The rule is, that if the devisor alter the estate, and limit it in a different manner from that in which it would have descended to the heir, the heir takes by purchase; because it is then another estate, which must descend from him, as the first purchaser, to his heirs on the part of his father.

It follows, therefore, that if a person seized in fee, devised lands to his eldest son in tail, the son, though heir at law, took by purchase; for it is a different estate from that which would have descended to him. This was undoubtedly the law of England, of course of this State, when this will took effect.—*Plowd.* 545. *b.*

But it has been argued for the plaintiff, that the act of 1784, which was subsequently passed, converted this estate-tail into a fee-simple, of which James became seized by operation of law, and without any act of his own; and, therefore, that he took the fee by descent.

He took the fee by force of the act of Assembly, but certainly not by descent from his father, for that was intercepted by the devise; he took, by the operation of the act, a new estate, with different qualities and incidents from his old one, and which could not have existed but for the previous estate devised under the will. The estate-tail was the *substratum* on which the fee was placed, and though it has larger capacities, cannot boast a higher or more worthy origin. Whether an estate accrues by descent, or by purchase, must be decided when it first falls or is acquired. To ascertain its character by any circumstance arising *ex post facto*, would be inconsistent with the policy of the law, in

relation to heirs who are liable to pay the debts of their ancestors, in virtue of lands coming to them by descent. It would involve the absurdity, that a person should take an estate by purchase, and continue to hold it a length of time without being liable as heir, during which period, all the suits against him, on the specialties of his ancestor, might be decided in his favor.—But afterwards the construction of some act of Assembly is applied to his estate—it is touched by the wand of legal magic—not only its name but all its properties are changed—time past, as well as present and future, yield to the enchantment, and the owner must pay those debts from which he has been once judicially exonerated.

To such a construction of the law we cannot yield. We believe that the estate-tail taken under the will, and the fee conferred by the act of 1784, were equally acquired by purchase, in the true sense of the word, aud consequently that it descends to the brother and sisters of the half-blood of James Everitt.

Judgment for the defendant.

M'Gehee v. *Draughon & Jordan.*

This is an action on the case, brought by the plaintiff against the defendants, for negligently keeping and managing their boat, kept by them, at their licenced ferry, for the transportation of persons and property across Cape Fear river, by which negligence the plaintiff sustained an injury by loss of property; and has laid his damages at one hundred pounds and upwards. The defendants pleaded in abatement, that the plaintiff is an inhabitant of the county of Person—that they, the defendants, are inhabitants of the

county of Cumberland, and that the matter in contest is not of the value of fifty pounds. The plaintiff demurred to the plea, and the defendants joined in demurrer.

The case was submitted.

TAYLOR, C. J. delivered the opinion of the Court.

The plea in abatement cannot be supported—it is essentially defective both in form and substance. The words of the act of 1793, *C.* 18, are " any debt or demand," but the plea substitutes the words " the matter in contest." The plea is defective in substance, because the action arises *ex delicto*, and it is therefore impossible to ascertain the sum the plaintiff is entitled to, before the jury have assessed the damages. The sum demanded in the writ, is upwards of one hundred pounds, so that the plaintiff, living in a different district from the defendant, is *prima facie* entitled to sue where he lives, his demand being above that fixed by the act in such cases. But even if he should obtain a verdict for a less sum than fifty pounds, it would seem to be straining the interpretation of the act, to suffer the jurisdiction of the Courts to depend upon a rule so uncertain and capricious, as the amount of damages in cases of *tort*. Let the plea be overruled and a *respondeas ouster* awarded.

Dunn v. *Stone.*

Powell v. *Eundem.*

The declarations in both these actions were the same. The substance of them was, that the plaintiff was possessed of a tract of land on the River Neuse, and a fishery adjoining it, from which he made great profits—that the defendant, intending to injure him, erected a mill dam across the river, below the fishery, whereby fish are prevented from passing

up the river, and the profits and advantages of his fishery are thus destroyed.

The defendant, by protestation, denies that the River Neuse, at the place where &c. is a navigable river, or that he has any knowledge of the plaintiff, his land or fishery, except that he is informed that Powell lives 15 miles above the dam, and Dunn miles above it; and, for plea, saith that he built the dam on his own land, for the purpose of giving him a head of water to turn mills and other machinery, and not with an intent to injure the plaintiff. Demurrer and joinder.

The cause was argued at a former term, by *Browne*, for the defendant, and at this term by *Nash* for the plaintiff.

For the plaintiff, were cited, *Sir John Davis's Rep. case of the fishery of the Banne*, 155.–*F. N. B.* 430.–4 *Bac.* 1364.

For the defendant, 5 *Co.* 72.–*Co. Litt.* 56. *a.*–*Cro. Eliz.* 118.–1 *Wils.* 174.–2 *Bl. Com.* 35.–*Act of Assembly*, 1787, *C. XV.*

TAYLOR, C. J. delivered the judgment of the Court.

It is to be decided whether an action can be sustained upon the facts stated in the declaration. The inconvenience occasioned to the plaintiff by the erection of the dam, is felt by him in common with all those, who own lands on the margin of the Neuse River, above the dam; and who, in consequence of such ownership, have been accustomed to take fish in the stream. This action cannot be supported without admitting, at the same time, the right of all such persons, even to the very source of the stream, to maintain similar actions. Their respective losses may vary in degree, but the principle of the action is equally applicable to them all; and if suits were thus multiplied, the inevitable consequence would be to overwhelm any individual against whom they might be brought, and thus lead to a severity of pu-

nishment utterly disproportioned to the offence, without affording to the public, that benefit, to which alone punishments can be legitimately directed.

The law, with admirable wisdom, has interposed an effectual barrier against so fruitful a source of litigation and injustice; and has separated, by well defined boundaries, injuries done to the public, from those done to an individual. Hence, for any of those acts which are in the nature of a public nuisance, no individual is entitled to an action, unless he has received an extraordinary and particular damage, not common to the rest of the citizens; as if a man suffer an injury by falling into a ditch dug across a common highway, —*Co. Litt.* 56,–5 *Rep.* 73,—or is thrown from his horse by means of logs laid across a highway,—*Carth.* 194—or receive any other special injury which is direct and not consequential. In all cases where the right is of a public nature, the denial of the right to an individual is not actionable, unless the plaintiff charges in his declaration, and proves a special damage; as where an action was brought against the owner of a common ferry, for refusing to ferry the plaintiff over, who claimed a right by prescription to pass toll free, it was held not to lie, because the right was common— 1 *Salk.* 12—and this proves too, that the objection to the action is not removed, by the act being more prejudicial to one man than another. Nor is it answered by shewing, that only a certain portion of the community, and not all the citizens, are incommoded by the act; for that occurred in *Williams's* case, before cited from 5 *C.* 73; a reference to which will shew, that only the tenants of a particular manor could possibly receive any detriment from the neglect which was laid as the ground of the action.

It is true that the law enjoins upon every man, and will enforce in a suitable manner, that precept of natural justice, so to use his own as not to injure another. But the rule, in every instance, pre-supposes that the party complaining has,

in the thing injured, a property either absolute or qualified. The cases of injuring the dwelling, of obstructing lights, of exercising offensive trades, and the many others stated in the books, are all founded upon this principle. But what property could plaintiff have in the fish, in their wild state, before they ascended to the water flowing over his land? In animals *feræ naturæ* a man may have a qualified property, which continues only while they are in his possession or under his controul; and so long they are under the protection of the law. But the defendant has the same extent of ownership in them, in virtue of which he might have caught them in his own water, and thus have done an equal injury to the plaintiff's fishery. Whether their progress thither is obstructed by a mill dam, or by being taken in weirs or nets, the plaintiff loses the benefit of his fishery. But in both cases, the defendant is exercising a legal right, and certainly with as respectable and beneficial a motive in the case of erecting a dam, as in that of catching fish.

It would produce the most extensive mischief in society to sanction the principle, that a man may be sued for using a right, to the consequential and indirect damage of another. Such a doctrine would unnerve all intellectual efforts in the advancement of science, arrest improvement in those arts, which diffuse around civilized man his chief comforts and highest ornaments; extinguish the lights of knowledge, and effectually check that spirit of useful discovery with which the present, more than any former age, has teemed, for the utility and embellishment of social life.

The frequent interference of the Legislature on the subject of fish, both in England and this State, impliedly recognizes common law right in the owners of the soil on both sides of the river, to exercise the property as they may think fit. Until the enactment of the law of 1787, *C. XV*, it was probably usual to build dams quite across some rivers, and entirely to obstruct the passage of fish: that act requires

one fourth of the river to be left open for the passage of fish. The common law right has been restrained also by several other acts, relative to seine fisheries, all directed to promote the benefit of the public, at the expence of the individual owners of the rivers. A penalty is annexed to the violation of those laws, and the interest of the public seems, in general, to be well protected by them. The result of our consideration of this subject is, that there should be, in both actions, judgment for the defendant.

SEAWELL and CAMERON, Judges, gave no opinion, having been of counsel in these causes.

Clark v. *M'Millan.*

The defendant gave the plaintiff an instrument of writing, signed by the defendant, but without seal; whereby he acknowledged that he had sold to the plaintiff a certain note of hand, for which he had received part payment, and the balance was to be paid when the money was collected.

The plaintiff offered to prove, by parol, that at the time of the contract, the defendant promised to commence an action against the payers of the note, or one of them, within ten days from the first October, 1806—that, in fact, six months expired before the action was brought. And whether such evidence is admissible, is the question submitted to this Court.

TAYLOR, C. J. delivered the opinion.

If the tendency of parol evidence is to contradict, vary, or add to a written instrument, it cannot be received; if to explain and elucidate it, it may be received. Upon the face of this writing there is nothing doubtful or equivocal. It states a simple transaction, and imposes no obligation upon

the defendant; but the object of the evidence is to shew, that when he made the contract, he entered into a stipulation, by which a duty was imposed upon him; for the breach of which, this action was probably brought This is in effect, to prove by inferior evidence, that which purports, on the face of it, to be a memorial of the defendant's contract, is in truth not so. Such evidence is inadmissible, according to all the authorities.

Williams v. *Lane.*

This petition was filed by Williams and Patsey his wife, and Jane Lane, against Alfred Lane, in order to obtain the opinion of the Court, as to the manner and proportion, in which a division should be made between the parties, of a tract of land devised to them, by the will of T. Hunter, dec.

The case was spoken to at a former term by *Gaston* for the petitioners, and *Browne* for the defendant, when the Court not having formed an unanimous opinion, it was continued under advisement till this term. The opinion of the Court was now delivered by

CAMERON, J. In this case, the testator, Theophilus Hunter, devised as follows: "I give and bequeath to my grandchildren, by my daughter Jane, as follows, to wit:—to my grandson Alfred Land, 350 acres of land, being the upper part of a tract of land of 700 acres purchased by me of Jas. Lane, lying on Crabtree Creek—Also, to my granddaughters Patsey Lane, and Jane Lane, I give and bequeath the lower part of the same tract of land, to be equally divided between them."

The tract contains, by actual survey, 1100 acres of land, and the question is, whether the defendant is entitled to 350

acres, being the upper part of the tract, or to one half of the tract?

The meaning of the testator is always to prevail, when it can be fairly inferred from the words he has used, and when it does not contravene any known or established rule of law. It does not follow, because the testator describes the tract in question, as a tract of 700 acres, and devises to the defendant 350 acres, being the upper part of the same, that he intended to give him one half of the tract. Suppose the tract only contained 500 acres, could the Court say that the testator only intended that the defendant should have 250 acres, when he has expressly and specifically devised to him 350 acres?—We apprehend not.

It was decided in the case of *Powel* v. *Liles*, in this Court, that describing a tract of land, as containing a specific number of acres, did not vary the case from a description of a tract by so many acres, more or less. If the testator had described the tract to be 700 acres, more or less, no question could have been raised. In our opinion, the words he has used mean nothing more than if he said 700 acres, more or less. Wherefore, a majority of the Court are of opinion, that the defendant, Alfred Lane, is entitled under the will of the said Theophilus Hunter, to 350 acres of land to be taken from the upper part of the aforesaid tract, and that the petitioners are entitled to have the residue of said land divided between them equally.

TAYLOR, C. J. I have formed a different opinion from that which has been pronounced, and will briefly state the reasons upon which it is founded. The intention of the testator seems to me apparent, upon the face of the will, to give his grandson Alfred, one half the tract of land, and the other half to be equally divided between his two granddaughters —and in this proportion he meant they should take, whatever number of acres the tract should be found to contain.

The testator believed that there were 700 acres in the tract, for in that way he described it—and under this belief he gives to Alfred that number of acres which amounts to half, describing it as the upper part. This induces me to think that he used the word "part" as synonimous to "half." But why is he silent as to the number of acres he devises to his granddaughters? For the obvious reason, that it was one half the tract, and must be the same in quantity that he had just given to Alfred. It had been twice told, and required not a repetition. He assigns one clause to the devise to Alfred; and a new, and separate one, to the devise to his two granddaughters—to the end, that the words "equally to be divided" might have a distinct and unequivocal reference to them, and to preclude any refinement of construction, which might also extend to Alfred and his half.

This would have been the undoubted construction of the will, if the tract of land had in reality contained the exact quantity of acres, which the testator believed it did. The intention would then have been considered clear, and the phraseology perspicuous. I cannot understand why this construction should be abandoned, because it happens in event that the tract contains 1100 acres. There is no revolting disproportion in the shares of the respective grandchildren; no ratio different from that which the testator himself designed. It is certain that each devisee would receive more than the testator expected, but they would receive it in the exact proportion that he designed and limited; inasmuch as 350 bears the same proportion to 175, that 550 does to 275. Yet how different is the result according to the judgment! Alfred's share instead of being equal to the shares of both his sisters added together, will be less than the share of either. If this question had been put to the testator,—"suppose there should be much more land in this tract than you think there is, do you intend in any event that your granddaughters shall, each, have more than your grandson?—I think he would have been very prompt in answer-

ing "No; I gave 350 to Alfred because I believe the tract contains 700, and I wish him to have half at all events, and the other half to be divided between his sisters."

As I take this to be the true construction, I cannot consent to yield it on account of a mistake in the testator as to quantity; a mere error in computation, which has been so often overlooked when the intention is plain.–1 *Vesey* 106. *Milner* v. *Milner* 2 *Bro. C. C.* 87.–*Williams* v. *Williams*. "If (says Lord Bacon) I grant my meadows in Dale containing 10 acres; and they in truth contain 20, the whole 20 pass" according to the maxim *veritas nominis tollit errorem demonstrationis.–Reg.* 25. If half the meadows had been granted in the same way, the grantee must have taken 10 acres; and I cannot perceive a difference between those cases, and where a man grants to A five acres, being the upper part of his meadows containing ten acres; and in another clause grants the lower part of the same meadows to be divided between B and C.

SEAWELL, J. dissented from the opinion of the Court.

State v. *Bryant.*

This case came before the Court on a motion to quash the indictment, which charged the defendant with petty larceny, in stealing *one half ten shilling bill of the currency of the State*, &c.

No argument was made in the case.

TAYLOR, C. J. delivered the opinion of the Court.

The thing charged to be stolen is not stated with the requisite precision and distinctness, to authorise the Court to pronounce judgment upon the offence, in the event of a conviction. Considered as currency of the State, it is of no

value, since no one is compellable to receive it; it is not a tender in payment. Nor could the defendant, by the description in this indictment, protect himself from a future prosecution for the same larceny. As it is actually decribed, there is no such thing known in the currency of the State; as it was probably meant to be described, it is not punishable as a larceny. Being therefore destitute alike of artificial and intrinsic value, the indictment cannot be supported.

Let it be quashed.

The State v. *Levin, a negro slave.*

The defendant is a negro slave, the property of William Pope. He was convicted of stealing a horse, the property of Zeno Worth—and it is referred to the Supreme Court to determine what judgment should be rendered against him.

TAYLOR, C. J. delivered the opinion of the Court.

The first time the offence of horse-stealing by a slave, appears to have been noticed by the Legislature, was in 1741, when, for the first offence, the punishment of whipping and the loss of ears was annexed to it; and for the second offence, death.–*C.* 8, § 10. At this period the benefit of clergy was taken away from the offence, generally, by several statutes,—*Ed. VI*, & 31 *Eliz. C.* 11—so that it must have been a capital crime in free persons: how long it continued so, we have not the means of immediately ascertaining, nor is it essential—it was so in 1779, because, in the private acts for that year, there is a pardon granted to a person under sentence of death for the offence. Shortly after the latter period, it is probable that the law underwent some change, because in 1784, an act was passed to prevent horse-stealing, only the title of which is preserved in the collection of the acts of

Assembly. But it was repealed by an act in 1786, from the preamble of which, it may be collected, that the act repealed, introduced the punishment of death; and the purview of this act substitutes the punishment of pillory, &c. Thus it continued till 1790, when the punishment of death was again introduced and has remained ever since. But all these acts subsequent to 1741 relate to the crime as committed by free persons, and do not interfere with its punishment when committed by slaves. It then follows that the judgment in this case must be pronounced under the 10th section of the act of 1741, *Cap. VIII.*

Bullock v. *Tinnen & wife.*

The complainant, Micajah Bullock, exhibited his bill against Nancy Bullock, (who afterwards intermarried with the defendant Carns Tinnen,) as administratrix of her former husband, Philip Bullock, charging that said Philip died intestate and without any children—that the complainant was entitled, as the representative and next of kin, to two thirds of the estate of said intestate, in the hands of the said defendant—and charged, that negro woman Betty and her children Jenny, Jordan, Davy and Leathy, with other property, came to the hands of said defendants. To which bill the said Nancy, before her intermarriage, filed an answer, admitting that her husband and intestate Philip, died on the 17th November, 1807—that the negro woman Betty and her children Jenny, Jordan, Davy and Leathy, with other property, came to her possession, but alleges, that on the day after the death of said Philip, the said Micajah did fully, freely, wholly and absolutely relinquish and yield up to this defendant, all the right and interest which he had, or might have, to any part of his said son's estate, by reason of his having died intestate. Whereupon the following issue was

made—Did the complainant, after the death of the intestate, yield and relinquish to the defendant, all his right and interest in the intestate's estate—if any, what part thereof, and what relinquishment did he make? If he did, upon what consideration, and whether by parol or writing, and at what time?—Whereupon the jury returned the following verdict—That on the 19th day of November, 1807, the complainant, Micajah Bullock, did yield and relinquish to the defendant, a certain negro woman by the name of Betty, and her children—that the consideration that influenced that relinquishment, was the love and affection the complainant had to the defendant Nancy Tinnen, (then Nancy Bullock;) and further—that the relinquishment was made by parol, on the day aforesaid, and that the said Nancy, then Nancy Bullock, was not present.

Upon motion to dismiss the bill, as seeks distribution of Betty and her children, it is referred to the Supreme Court to determine and adjudge what decree shall be made.

The case was argued by *Browne* and *Norwood* for the complainant, and *Nash* for the defendant.

TAYLOR, C. J. delivered the opinion of the Court.

Whatever wishes the circumstances of this case may be fitted to inspire, the Court are not apprised of any authority or principle of law, by which the transaction between Bullock and his daughter-in-law can be supported.

The delivery of possession has ever been deemed necessary to complete the gift of chattels, except they are granted by deed, or are incapable of being delivered. "Every thing that is not given by delivery of hands, must be passed by deed. The right of a thing, real or personal, may not be given in nor released by word."—*Noy. maxim* 33. If the gift does not take effect, by the delivery of immediate possession, it is then not a gift but a contract, the performance

of which can only be compelled upon good and valuable consideration.–2 *Bl.* 442. It has even been held that if a man, without consideration, deliver a thing to another to be given to a third person, he may countermand it at any time before delivery over.–*Dyer* 49.

The rule of the civil law appears to have been less strict, with respect to gifts, than the common law; but though it did not require a delivery, the presence of the party, to whom the gift was made, was deemed essential. It substituted, besides, other ceremonies, which were perhaps as well calculated to make the transaction public, and to guard against haste and imposition, as those required by our law. It is the object of all laws to enforce the performance of those contracts and engagements which grow out of the relations and state of society; and the ceremonies requisite to their validity are designed to fix and ascertain the intention of parties, and the degree in which they mean to incur a legal responsibility. No man who deliberately makes a promise, can in morality or honor, recede from the performance of it, without very sufficient reason; but the law lends its aid in compelling the performance of those engagements only, which are contracted under prescribed ceremonies, and evidenced by certain proofs of deliberation. A man may have a present intention to do a thing, or may intend to do it in future, and express himself to that effect, without meaning at the time, to lay himself under a legal obligation. And it may well be doubted whether it would be wise, if it were practicable, to give legal effect to those promises which are made without due deliberation, or under the influence of some strong emotion, the presence of which, in a greater or less degree, interrupts the calm decisions of the judgment:—whether the heart abandon itself to the transports of joy, or is weakened by the sympathy of grief, something is deducted from the prudence and circumspection which the mind exercises in the ordinary concerns of life. The Court overruled the motion to dismiss the bill.

Squires v. *Riggs.*

R. Squires made a conveyance, in consideration of blood only, to his child, the lessor of the plaintiff, by deed. Afterwards, R. Squires, by deed, for valuable consideration, conveyed the lands to William Jones—but such conveyance was not *bona fide*, being made with the intention of removing the land from the reach of the creditors of Squires—Jones conveyed to John Riggs, for a valuable consideration, who had notice of the circumstances under which Jones received his conveyance. The defendant holds under Riggs.

The jury, upon these facts, found a verdict in favor of the plaintiff,—and a motion is made for a new trial upon the ground, that the verdict is contrary to law.

The case was argued by *Donnell* for the plaintiff and *Gaston* for the defendant.

Taylor, C. J. delivered the opinion of the Court.

The statutes relative to fraudulent conveyances, have, from the periods of their enactment, received that construction which appeared most likely to suppress deceitful practices, and to obviate all temptation to commit them. And the principle arising in this case, was brought under the notice of the court at a very early period after the passing of 27 *Eliz.* when such a decision was made as might have been expected from the spirit and policy of the statute; for it would seem strange that a person setting up a title, which bore upon its face the character of iniquity, and was avowedly designed to defraud creditors, should shelter himself under a law, the very design of which was to frustrate and discountenance all such attempts. Accordingly it has been held in every case, in which the question has occurred, not only that a purchaser must have paid a valuable consideration, but that the transaction must be fair and honest; and

although it is not possible, perhaps, to find a case where the purchase was made precisely with the same view, viz. to defraud the creditors, as in the case before us, yet the *bona fides* is required as indispensable; for it surely cannot make any difference in principle, whether the transaction, if it be really corrupt, receive its impurity from one source or another. There is a case cited in *Twynes*, case 3 *Co.* which lays down the law in very explicit language. A person having made a voluntary conveyance of his lands, afterwards being seduced by deceitful covenous persons, for a small sum of money, bargained and sold his land, being of a great value. This bargain, though it was for money, was holden out of the statute, which being made against fraud does not help a purchaser who does not come to the land for a good consideration, lawful and without fraud and deceit. Though this case does not involve the rights of creditors, yet it may fairly be considered a direct authority for the principle, that a prior voluntary conveyance shall not give way to a subsequent purchaser who has conducted himself dishonestly. It is, in effect, giving to the word purchaser, under the statute, the same meaning which is affixed to it in Courts of Equity, as one who innocently and without fraud or surprise, for valuable consideration, acquires a right or interest. The cases in *Cro. Eliz.* 445, and 1 *Bur.* 396, are to the same effect. In the last case that is recollected, where the same question has occurred, the language of the Court is particularly strong. The amount of it is, that a purchaser is not entitled to the protection of the statute, unless the transaction is *bona fide* and the purchase fair in the understanding of mankind. It is not necessary that it should be for money, but it must be fair: if it is colourable only it cannot stand.—*Cowp.* 705.

Upon the whole we think the plaintiff entitled to judgment upon the reason of the thing, the policy of all the statutes and acts concerning fraud, and the unvarying exposition

they have received in respect to the point of this case.

Judgment for the plaintiff.

Harton & wife v. *Reavis.*

This was an action of slander, to which the defendant pleaded "general issue, justification and statute of limitation."

Upon the trial the plaintiff proved, satisfactorily, and clearly to the Court, the speaking of the words, and within six months before the commencement of the action.

The defendant attempted to prove justification, in which, in the opinion of the Court, he wholly failed—and the plaintiff, in the opinion of the Court, was entitled to exemplary damages.

One of the jurors was called by defendant, as to the time of speaking the words, who, in the opinion of the Court, from other evidence, was clearly mistaken in his evidence.

The jury found that the action was not commenced within six months of the speaking of the words, and upon a motion for a new trial, the point is referred to the Supreme Court.

The case was submitted without argument.

TAYLOR, C. J. delivered the opinion of the Court.

We entertained some doubts on first reading this case, whether it was competent in the Court to award a new trial, but not finding, upon examination of the authorities, any that can justly be considered as opposing it, and the reason and justice of the thing being clearly the other way, we think the case ought to be submitted to the consideration of another

jury. It is very difficult to lay down any general rule on this subject, on account of the numerous exceptions which the ever varying circumstances of cases continually furnish, which must, after all, influence the legal discretion of the Court, as directed to the furtherance of justice. The practice of the Courts in Westminster-Hall has been gradually acquiring liberality, in granting new trials, in cases of tort, where the damages are excessive. In the case of *Beardmore* v. *Carrington*, 2 *Wils.* 2144, it was said there was no case to be found where the Court had granted a new trial for excessive damages in a case of tort; and though the power of doing so was not denied, yet it was said it ought not to be exercised, but in flagrant and extreme cases. In *Dubberly* v. *Gunning*, 4 *Term Rep.* 651, which was an action of *crim. con.* the Court refused to grant a new trial, although they thought the damages excessive. But in an action of assault and battery, which occurred soon afterwards, they granted a new trial for excesive damages, saying that the case of *Dubberly* v. *Gunning* was *sui generis*, and that the Court were not unanimous.–5 *Term* 257. And there are several cases where, though the Court refused a new trial, they admitted their power to grant it, if the damages had been greatly disproportionate to the injury received.–3 *Bur.* 1845, 2 *Bl.* 184. It would appear from these authorities, that the Court have power to interfere in all cases of tort, except *crim. con.* respecting which, a notion prevailed that the jury were the uncontroulable judges of the damages, as they were given for wounded feelings, and the loss of happiness, the extent of which, only the jury could estimate. This exception, however, seems no longer to exist, for in a late case it is said, that if it appeared from the amount of the damages, as compared with the facts laid before the jury, that the jury acted under the influence, either of undue motives, or some gross error or misconception of the subject, it would be the duty of the Court to grant a new trial.–6 *East* 256.

There is a dictum of Lord Holt's cited in *Comyn's, Pleader, R.* 17, that a new trial is not usually granted in an action of slander. The case appears, by the report in *Salkeld*, to have occurred 8 *Wil.* 3, and as the same thing is said by the same Judge, at other times, it was probably the law and practice of that day.–*Holt's Rep.* 704. But in a case that occurred about forty-three years afterwards, on a motion to set aside a verdict, on account of the smallness of the damages in an action of slander, the Court state that verdicts had been frequently set aside for excessive damages, but they knew of no precedent for setting them aside for the other cause, though they acknowledge the reason to be equally strong in both cases.–*Barnes* 445. And it may be inferred from subsequent decisions, that these actions were governed by the same principles with all other actions of tort, with respect to new trials. In an action for words, which were fully proved, the jury found a verdict for the defendant. On a motion for a new trial, Lord Mansfield, who tried the cause, reported that he expected a verdict for plaintiff, but *with very small damages*, as the words were spoken in heat and passion, and never afterwards repeated. The Court, without adverting to any rule applicable to the particular action, and restraining the exercise of their discretion, said they would not grant a new trial for the sake of six-pence damages; in mercy to the plaintiff, as well as the defendant.–2 *Bl. Rep.* 851. In another case still later, where the jury had found for the defendant in an action for a libel, but which the Judge reported to be against evidence, but that the injury done the plaintiff was so very inconsiderable, that he should have thought half a crown, or even a much smaller sum, to have been sufficient damages, the Court overruled the motion for a new trial; saying they ought not to interfere, merely to give the plaintiff an opportunity of harrassing the defendant at a great expence to himself, where there has been no real damage, and where the injury is so *trivial* as not to deserve above half a crown compensation. The Court also advert

to the cause of action being in the nature of a crime, and its being indictable.–*Burton* v. *Thompson* 2 *Burr.* 664.

The unavoidable inference from these cases is, that if there existed any principle or usage, restrictive of the power of the Court to award a new trial in actions of slander, either for smallness of damages, or because the defendant had been acquitted, such rule would have formed the ground of decision—it would have been a decisive answer to the application for a new trial, and rendered a discussion of the merits altogether irrelevant.

And it may, with equal probability, be added, that if the cases had presented a positive injury sustained by the plaintiff, and a finding of the jury against evidence, the verdicts would both have been set aside, in order that justice might have been done; for it cannot be called ministering to the passions of a man, to furnish an opportunity of procuring legal redress to him, upon whose character a deep wound has been inflicted. In the case before us, the damages ought, in the opinion of the Judge who tried the cause, to have been exemplary,—and the verdict was against evidence. We therefore think a new trial should be awarded.

Darden's Heirs v. *Skinner.*

This was a bill in equity praying to be let in to the redemption of certain premises conveyed by a deed, absolute on its face, but which charged to have been procured so to be made by fraud and stratagem. The defendant claiming as devisee from grantee, denied all knowledge of the transaction, but admitted he was administrator *de bonis non* of the grantee, amongst whose papers he had found a bond for £174, given by the ancestor of the complainants, and bearing date a short time before the date of the deed. The defendant further

alleged in his answer, that if there was any trust between the parties to the deed, it was created with a view to defraud the grantee's creditors.

Upon this case two issues were submitted to the jury.—1. Whether the deed was intended to be an absolute one or a mortgage. 2. Whether the intent was to defraud Darden's creditors.

It appeared in evidence, that the land was worth five dollars per acre, that it was listed for three hundred acres, but the witness who had lived upon it, and was acquainted with the boundaries, believed there was not more than one hundred and seventy-five acres.

The consideration of the deed was five hundred pounds, and it appeared that about the date of it, the grantor was much embarrassed in his circumstances; and that shortly afterwards all his property was taken in execution and advertised for sale, which was forbidden by the grantee, who produced the deed: all the other property was then sold, except the land, but was insufficient for the payment of the debts. The grantor remained in possession of the land during his lifetime, from 1793 to 1798.

The verdict of the jury was, that the land was mortgaged, and that the deed was not intended to defraud creditors.—On a motion for a new trial, the case was submitted to this Court.

TAYLOR, C. J. delivered the opinion.

Every part of the evidence upon which the jury founded their verdict, tends strongly to establish, that the transaction between Darden and the defendant's intestate was fraudulent. The embarrassed condition of the former when the deed was made—his remaining in possession of the land continually till his death—the secrecy of the transaction, of which there is no proof that it was made public, till the ex-

igency of Darden's affairs required Skinner to come forward and save the land from being sold—and the inadequacy of the consideration, if indeed there was any paid, the only proof being that a bond of £174 was found amongst Skinner's papers, whereas the lowest value of the land was upwards of £800,—are all circumstances which would probably exist in a scheme to defraud Darden's creditors, but are not easily reconcileable with a fair sale to Skinner, or even with a *bona fide* mortgage to secure the payment of a just debt. The Court have no hesitation in awarding a new trial of the issues.

Lenox v. *Greene & others.*

This was an appeal from the decision of the Superior Court of Craven, overruling a motion for a new trial made by the plaintiff, on the following grounds, viz. a verdict against evidence, without evidence, and an erroneous charge of the Court.

This action was brought against the defendants as sureties of William Henry, Sheriff of Craven County, for breach of his official bond. On the plea of performance, the issue to be decided, turned wholly on the fact,—Whether a judgment recovered by John Lenox against Benjamin Williams, and which had been collected by Henry, under execution, had been paid to Lenox or not? The judgment of Lenox against Williams was for one hundred pounds in an action of assault and battery.

The execution issued from Salisbury Superior Court, tested the 2d October, 1793, and was returnable to the 19th March, 1794. On this execution the sheriff made two returns, which were in the following words, viz.

"Satisfied in full.—Wm. Henry, *Sheriff*." Also—"Judgment paid plaintiff.—Wm. Henry, *Sheriff*."

The defendant produced a receipt, in the following words:

"Received of William Henry, Esq. Sheriff of Craven County, 51*l*. 11*s*. 2*d*. by the hands of William Slade, in full, for the costs of a suit recovered in Salisbury Superior Court, at the instance of John Lenox against Benjamin Williams, Esq. together with the execution issued on said suit.

"MONTFORT STOKES, *Clk. Sup. Court Law.*

"Newbern, 20th July, 1794."

William Henry died in the fall of 1799. No demand was shewn to have been made by Lenox until the fall of 1809, when a claim was preferred against the securities, and in the June following the present suit was brought. John Lenox has been, since 1794, and yet is, a resident of Rockingham County. The defendants are residents of Craven County. Montfort Stokes was at Newbern, in Craven County, at the date of the receipt, as a Clerk of the State Legislature, then sitting at Newbern.

The Court instructed the jury that they were at liberty to presume, from the lapse of time, and the circumstances herein stated, that the judgment was paid—And the jury found a verdict accordingly.

The cause was argued by *Gaston* for the plaintiff, and *Mordecai* for the defendants.

Taylor, C. J. delivered the opinion of a majority of the Court.

The jury have presumed a payment of this judgment after a lapse of something more than fifteen years, of which Henry, the sheriff, was alive only about five; and in aid of the presumption, arising from length of time, other circumstances are relied upon, as that Henry returned the execution, with

two indorsements, one of which stated, that it was satisfied in full, the other, that he had paid the amount of the judgment to the plaintiff. In addition to these circumstances, the defendants relied upon a receipt, signed by the Clerk of Salisbury Superior Court, for the amount of the costs,—upon the non-production of proof by the plaintiff, of any demand made by him till the fall of 1809, and upon the fact of his residence in Rockingham County since 1794, and the defendants' in Craven County. It also appears that the Clerk of Salisbury Superior Court was in Newbern, at the period his receipt bears date.

These circumstances, it is said, fortify and support the presumption arising from the length of time, (which is admitted not to be alone sufficient) and completely justify the finding of the jury.

But we do not perceive in any of these circumstances, taken singly, nor in all of them together, that weight and conclusiveness, which ought to exist, before a man is deprived of a debt due by the high evidence of a record.

Presumptive evidence ought not to rest upon conjecture and surmise—it must be built on a solid foundation. A legal presumption does not arise because probability preponderates on one side, rather than on the other—it is created only then, when the circumstances are such, as to render the opposite supposition improbable; and when we are about to defeat a right, the presumption ought to be stronger, than when it is to be supported.—*Cowper* 216.

The sheriff's return is his own act, and considered as evidence *per se*, it cannot be introduced in favor of himself or his securities—it is evidence only against them. It might, in connection with other circumstances, become evidence against the plaintiff—if, for example, he had seen it a long time since and acquiesced in it, it might be supposed that he knew its truth. But this important fact, instead of being

proved, is supposed—this essential link in the chain of circumstances is deficient. But why should it be supposed that the plaintiff saw this return? The time when he would most probably have looked for the execution was, when it was returnable, and ought to have been returned. That was at March Term, 1794, but instead of being returned then, it was delivered to the Clerk at Newbern, in July, 1794, as appears by his receipt. And even if the return had been made in due time, the probability of its having come to the knowledge of the plaintiff, must depend upon many circumstances, not proved, and which the jury had no means of ascertaining,—upon the degree of attention usually paid by the plaintiff, to his affairs, upon his condition, wants, and vigilance.

The facts from which a presumption is deduced, ought to be consistent with the proposition which they are intended to establish. Here the proposition intended to be maintained is, that Henry paid the plaintiff his debt—but a fact proved is, that he did not pay the costs, an incident to the debt, when they ought to have been paid; and then not at Salisbury, but at Newbern, where the Clerk personally met him. Now, if the effect of a presumption, in serving as a proof, depends on the justness of the consequences, drawn from certain facts, to prove others which are in dispute, should we not lose sight of the principle, in presuming punctuality in that part of a transaction which we *cannot* see, when we are furnished with positive proof of delinquency in that part which we *do* see? As, therefore, we are not apprised of any adjudication where the jury have been left to presume payment even of a bond, after the lapse only of fifteen years; and as the circumstances here proved do not, in our conception, aid the time, we think a new trial should be granted.

Henderson, J. I do not concur in the opinion of the Court. It is not contended by me, that a presumption of payment arises, short of a period of twenty years, where

there were no circumstances to aid the presumption; but if there were, it was properly left to the jury to presume a payment, although twenty years had not elapsed. It was the province of the Court to see that those circumstances were relevant,—and of the jury, to give them their due weight;—and the Court, in this case, can grant a new taial, only in case the Court or jury erred in discharging their respective duties. That the plaintiff caused an execution to issue—that the execution was returned with an indorsement of satisfaction, and the money paid to the plaintiff—that the plaintiff lived not more than seventy miles from Salisbury, where the execution was returned—that he took no further steps during the life of the sheriff, to enforce the payment—that the sheriff died in the year ,—were, certainly, all relevant circumstances. That the plaintiff had a knowledge of the return of the execution, or that the return was true, was a fair inference made by the jury; for we can scarcely believe, that a man who had prosecuted an action to judgment, and recovered one hundred pounds, and caused an execution to issue, and to be delivered to the sheriff at the distance of two hundred miles, would, at once, remit his exertions and abandon his claim for fifteen years—so, take it either way, it affords a strong presumption that the sheriff's return was true. It is farther observable, that the execution was returned to the Court of the district in which the plaintiff continued to reside. It is said that this is permitting the sheriff to create evidence for himself; but it is not the sheriff's act, but the conduct of the defendant, which raises the presumption—it is like an assertion, made in the presence of a man, of a fact within his knowledge, and affecting his interest, and not contradicted by him. There are other circumstances in the case, but I deem those already mentioned sufficient. I therefore think it not barely such a verdict as ought not to be disturbed, but such as the law and justice of the case require.

Williams & wife v. *Holly.*

Nathaniel Holly being seised in fee of the premises in question, devised them in the following words:

"I give and bequeath to my daughter *Ann Britt*, one hundred and twenty five acres, whereon she and her husband now live, to she and her husband during each of their life-time, and no longer, if dying without any lawful heirs begotten of their bodies, and if any lawful heir, to that and its heirs forever, otherwise, to return to my heirs at law and their heirs forever."

The testator died in 1780. The husband had issue by his wife, which issue died in 1788; the husband died in 1790, living his wife, who, in 1804, devised the land to the lessors of the plaintiff.

The preceding facts were admitted in a case agreed, sent to this Court and submitted without argument.

TAYLOR, C. J. delivered the opinion of the Court.

The Court do not perceive any circumstance in the character of this devise, which ought to prevent the direct application of the rule in *Shelly's* case,—that where the ancestor, by any gift or conveyance, takes an estate of freehold, and in the same gift or conveyance, an estate is limited, either mediately or immediately, to his heirs in fee or in tail, that always in such cases, *the heirs* are words of limitation and not words of purchase.

In cases like this, where there is no intermediate estate, the remainder is executed in the ancestor, and as both estates are of the same quality, viz. legal, they unite and coalesce.

It is said in *Co. Litt.* 183, *b.* 184, that where there is a joint limitation of the freehold to several, followed by a joint

limitation of the inheritance in fee simple to them, as an estate to A & B, or for their lives, or in tail, and afterwards to their heirs, so that both limitations are of the same quality, that is, both joint, the fee rests in them jointly. And so if the limitation of the freehold be to husband and wife jointly, remainder to the heirs of their bodies, it is an estate-tail executed in them, as they are capable of issue, to whom such joint inheritance can descend. In this case the limitation of the freehold is joint to Britt and his wife, and is followed by a joint limitation of the inheritance. Upon the death of the husband it survived to the wife, who thus became seised in fee, and consequently had a right to devise the land to the lessor of the plaintiff, for whom there must be judgment.

State v. *McEntire.*

An indictment was found against the defendant, in the Superior Court of Rutherford County, for the murder of Larkin Dycus, and was transmitted for trial, to Lincoln Superior Court, upon an affidavit filed by the Solicitor. The defendant was found guilty, and upon being brought up to receive judgment, the following reasons, in arrest, were offered by his counsel.

1. That the County Court of Rutherford had returned to the Superior Court of the same County, forty jurors as a *venire*, whereas they had authority by law to return only thirty; and that the Grand Jury, who found the bill, were composed out of the *venire* so improperly returned.

2. That John Hardcastle was a juror on the coroner's inquest, and also one of the Grand Jury, by whom the bill was found.

3. That the transcript sent from one Court to the other, does not shew that the bill was either found upon evidence under oath, or that any witness was sworn and sent to the Grand Jury.

The case was argued by *Wilson* for the State, and *Murphey* for the prisoner. For the former, were cited, *Bac. Abr. Tit. Jurors A. Jones* 198—for the prisoner, 3 *Inst.* 33, *Cro. Car.* 134.

TAYLOR, C. J. delivered the judgment of the Court.

The act of Assembly specifies the number of jurors which shall be returned to the Superior Courts, and is directory to the County Courts in that respect; but is wholly silent as to the legal effect of returning a greater number. We must, therefore, have recourse to those principles of construction, and modes of proceeding, which have always been applicable to analogous cases; and none can be more strictly so, than when there have been causes of challenge, either to the array or the polls, which the party indicted did not avail himself of upon his arraignment, but withheld to a subsequent stage of the proceeding. Such instances have often occurred in the practice of this State, and the decisions, as far as they are known or remembered, have uniformly overruled the objections, upon the principle that where the law has given the party a full opportunity of bringing forward his objections, and ascertained the period when they shall be disclosed, he ought not to be heard at a future time.

The extent of this principle, the justice and necessity of its observance, and the decisive application it has to many branches of the law, may be illustrated by various examples; as in challenges, he who has several must take them all at once—after one hath taken a challenge to the polls, he cannot challenge the array.—*Co. Litt.* 58. If a party has a cause of challenge which he knows of before trial, and does not take it, he shall not have a new trial.—11 *Mod.* 119. In pleading,

if the defendant plead to the writ, he loses the benefit of a plea to the person.–*Ibid* 303. *a.* In the trial of right, after money has been paid under legal process, it cannot be recovered back again, however unconscientiously retained by the defendant.–7 *Term* 269.–2 *H. Bl.* 414. The statute of *West.* 2, *C.* 1 enacts, that all fines contrary to that act, shall be null, yet it has been construed to mean only voidable; by some legal proceeding.–4 *Term* 600.

With respect to the qualification of jurors, the statute *West.* 2, *C.* 38, directs the sheriff not to summon men who are sick, aged, or not dwelling within the County. Yet, if they were summoned, and did appear, they could not be challenged by the party, nor could they excuse themselves from not serving, unless there were enough without them–2 *Inst.* 448—though certainly these were as unlawful jurors, as the number above thirty, in the present case.

But the statute of 11 *H.* 4. *C.* 9, after prescribing the qualification of jurors, and the manner of their return, expressly declares that indictments, found by persons disqualified in the statute, shall be void. The strong expressions are, "that the same indictment so made, with all the dependance thereof, be revoked, annulled, void, and holden for none forever." It has been observed by Lord Coke, that the safest way for the party indicted is, to plead, upon his arraignment, the special matter given him by this statute, for the overthrow of the indictment, with such averments as are by law required, and to plead over to the felony. For this he cites *Brooke's Abridg. Indict.* 2. We have examined the passage referred to in *Brooke*, which, though written in the strange dialect of that day, is, if we rightly understand it, more explicit. His words are, which for the sake of authenticity, we extract in the original, *q ou home est indite de fel' p ceux dont part sont indites ou ult' de fel,' et ant acquite p pdn, issint q ils ne sont probi nec legales homenes, ideo fuit agard que les inditemts p eux present sera void, et les parties q sont indites*

ne sera arraignes sur ceo, et nota q cest matter doet estr pledr p cesty q est err sur cest inditemt devant que il plede al felony, et felon arraign sur inditemt ne sera suffer de relinquer general pardon p parliant et de pleder al felon. The meaning of this, we take to be, that "where a man is indicted of felony by those, a part of whom have been indicted or outlawed of felony, and have been acquitted by a general pardon, so that they are not good and lawful men; therefore, it was agreed, that the indictments by them presented, shall be void, and the parties who are indicted shall not be arraigned on them; and note that this matter ought to be pleaded by him who is arraigned on such indictment before he pleads to the felony, and the felon arraigned on the indictment shall not be suffered to relinquish the general pardon, by parliament, and to plead to the felony." And this seems to be the method in which objections to the Grand Jury, arising under the statute, have always been taken, first by way of plea, and if that is overruled, pleading over to the felony–*Wm. Jones* 98 —or, as it is said in some books, pleading the objection to the indictment, and, at the same time, pleading over to the felony.–*Hawkin's Indictment*, § 26. At common law, whatever were good exceptions to a Grand Jury must have been taken before the bill found.–*Bac. Abr. Juries A.* And as to those objections which arise out of the several statutes, it is the better opinion that they are not allowable, unless they are taken before trial.–*Ibid.* We are therefore of opinion, that the reasons of all the decisions apply with increased force to the case under consideration; and that whatever weight there might have been in the objections to the Grand Jury, if taken at a proper stage of the proceeding, upon which, however, it is not necessary that we should give an opinion, it is now too late for them to prevail.

As to the third reason, it does not seem necessary to say more than that sufficient appeared upon the transcript to warrant the trial of the prisoner; the bill was found a true bill by the Grand Jury, and was pleaded to, and it cannot be

presumed that it was found without evidence. I am directed by the Court, to say, that all the reasons in arrest are overruled.

State v. *Davis.*

The defendant was indicted under the act of 1779, *Cap.* , "to prevent the stealing of slaves, &c." The indictment charged the negro stolen to be the property of *John Murrell, dec.* Upon the trial in Northampton Superior Court, the jury found a special verdict, the material statements in which were, that on or about the 15th December, 1814, the negro Luke, the property of John Murrell, was in his possession in the County of Northampton; soon after which the negro ran away from him, and whilst he was so runaway, the defendant knowing the fact, and that the slave was the property of Murrell, feloniously did steal, &c. and afterwards did sell him for his own benefit. The case was referred to the decision of this Court, whether, upon the whole matter, judgment could be awarded under the act of Assembly.

Daniel, for the prisoner, cited 1 *Hale* 506–1 *Hawk. C.* 33, §1.

TAYLOR, C. J. delivered the opinion of the Court.

The two questions to be decided are, whether the facts found amount to felony in point of law—and if they do, whether they are set forth in the indictment in a sufficient manner to warrant the Court in pronouncing judgment against the prisoner?

1. The finding of the jury fixes upon the prisoner all the essential circumstances to constitute a felony, and excepts this case from the operation of the principle relied upon in his behalf. It not only comes within the reason of the ex-

ception to the general rule but is one of the very cases put in the books, to illustrate the rule and define its extent. The prisoner knew that the slave was run away, and that he belonged to Murrell, and, with this knowledge, took him into his possession, and, in less than a month afterwards, sold him. We lay no stress upon the jury having found that the taking was felonious, for we understand that the law is to be found upon the whole case, and that it is to be decided whether the jury have correctly drawn that inference.

The reason why felony cannot be committed in taking treasure trove, waifs, or estray is, that the owner is unknown; the first, becoming the property of the finder, if no owner appears; no property in the second vesting before seisure, nor in estrays until the expiration of the year from the time of appraisement—and in these, it is always understood, that the owner is unknown to the person who takes them up. The rule applies, also, to finding a purse in the highway, which a person takes and carries away,—it is no felony, although the usual proofs of a felonious intent follow the act. "If one lose his goods and another find them, though he convert them *animo. furandi* to his own use, yet it is no larceny, for the first taking is lawful."—3 *Inst.* 107. But, in all these cases, the person taking the property must really believe it to be lost, for if he do not, and take it with the intent to steal, he will not be excused by the pretext of finding, otherwise every felony would be so excused. This is expressly laid down in *Hale* and other writers. If a man's horse, is grazing at large on his neighbor's ground, and it be taken with a felonious intent, the crime is complete. In short, this principle will be found to pervade all these cases, and ascertains every taking to be a felony, if the intent be such, provided there was no reasonable cause for believing that the thing was lost.

2. But judgment cannot be pronounced on this indictment, because it lays the negro as the property of John Murrell,

dec. The indictment speaks in the imperfect tense, and relates to the 6th January, 1814, confining the stealing to that period. To whom did the property *then* belong, which was thus stolen? The indictment answers, to John Murrell, deceased. This is the only way in which the charge itself can be understood, without interposing an advent of time present, between the name and "deceased." We learn, indeed, from the special verdict, that Murrell did not die till the March following; but if the indictment be not legal and certain, in itself, it cannot be aided by the finding of the jury. And that it is defective, in this particular, seems almost too plain to require argument or authority. If the owner of goods be really unknown, it may be so stated in the indictment; but if it be proved on the trial, who the owner is, no conviction can ensue, upon such a charge. If the goods which belonged to a deceased person are stolen, they must be laid as the property of the executors or administrators, for on them the law casts the title. Judgment arrested.

AN ABRIDGEMENT

OF THE

STATUTE LAW OF GREAT-BRITAIN,

NOW IN FORCE IN NORTH-CAROLINA.

CONTINUED FROM VOL. I, PAGE 155.

BASTARDS.

20 *Hen. III, C.* 9. The Bishops instanced the Lords that they would consent, that all such as were born afore matrimony should be legitimate, as to the succession of inheritance—but they, with one voice, refused to change the law of the realm.

BUYING TITLES.

32 *Hen. VIII, C.* 9. No one shall sell, or purchase, any pretended right, or title, to land, unless the vender hath received the profits himself for one year before the grant, or hath been in possession of the land, or of the reversion or remainder, on pain that both purchaser and vender shall each forfeit the value of such land.

CHAMPERTY.

33 *Ed.* 1. The attainted of Champerty shall suffer three years imprisonment, and be finable at the King's will.

28 *Ed.* 1. None shall take upon him a business in suit, with intent to have part of the thing sued for; neither shall any, upon any such covenant, give up his right to another,—on pain that the taker shall forfeit so much of his land and goods as amount to the value of the part so purchased for

such maintenance, to be recovered by any that will sue for the King in the Court where the plea hangeth.

This shall not prohibit any to take counsel at law for the fee, or of his parents or friends.

33 *Ed.* 1. Champerters are such as move pleas and suits, or cause them to be moved, either by themselves or others, and prosecute them at their own charge, to have part of the thing in variance, or part of the gains.

CONDITIONS.

32 *Hen. VIII, Cap.* 34. Grantees of reversions may take advantage of conditions and covenants against lessees of the same lands, as fully as the lessors, their heirs or successors, might have done.

II. Lessees may also have the like remedy against the grantees of reversions which they might have had against their lessors or grantors, their heirs or successors; all advantage of recoveries in value by reason of any warrant in deed or law by voucher or otherwise, only excepted.

CONSPIRACY.

33 *Ed.* 1. Conspirators are such as bind themselves by oath or other alliance, falsely and maliciously to indict, and move and maintain pleas; and such as cause children within age to appeal men of felony, and retain men to maintain their malicious enterprizes,—and this extendeth as well to the takers as givers.

CORONERS.

3 *Ed.* 1.* They shall take nothing of any man to do their office, on pain of great forfeiture.

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* The parts in Italics, are not in force here; and other parts of this act are omitted for the same reason.

4 *Ed.* 1. They shall go to the places where any be slain, or suddenly dead, or wounded, or where houses be broken, *or where treasure trove is found*, and shall make enquiry whether the person was slain, where, how, and who were present; and whoever is found guilty by the inquisition, shall be delivered to the sheriff, and committed to goal; and such as are found not culpable shall be attached, if they were present, till the coming of the Justices, and their names shall be written in rolls. If the body is found in the fields or woods, it is to be enquired whether the person were slain there or not; and if not, they shall try to trace him who brought the body there, and how it was brought; and ascertain whether the dead person were known, or a stranger, and where he lay the night before; and after all the proper enquiries are made, the body is to be buried.

II. They shall make inquiry where a person is drowned or suddenly dies, into the exact manner of his death; and if he was not slain, then to attach the finders and all others in company—*likewise of treasure trove, who were the finders, and who are suspected; of appeals of rape, of wounds, especially if they are likely to prove mortal, in which case the party appealed is to be taken immediately and kept till it be known whether the wounded person will recover or not.* Hue and cry shall be levied for all murders and burglaries.

14 *Ed.* 3, *C.* 8. A coroner shall have sufficient in the County whereof to answer all people.

COUNTERFEIT LETTERS.

33 *Hen.* 8, *C.* 1. If any shall falsely obtain any money or other thing by colour of any false token, or counterfei letters, they being thereof convict by witnesses or confession, shall suffer such punishment as shall be adjudged by the person or persons before whom they shall be so convict, the pains of death only excepted.

CREDITORS.

21 *Jac.* 1, *C.* 24. The party or parties at whose suit any person shall stand charged in execution, for debt or damages recovered, their executors or administrators, may, after the death of the person so charged in execution, lawfully sue forth new execution against the lands and tenements, goods and chattels of the person so deceased, in like manner as if the person deceased had never been taken in execution.—But this act shall not extend to land sold *bona fide* (after the judgment given) when the money raised thereupon is paid, or secured to be paid to creditors in discharge of due debts.

DECEIT.

3 *Ed.* 1, *C.* 29. If any person do act or consent to any thing in deceit of the Court or the party, and thereof be attainted, he shall suffer a year and a day's imprisonment; and if he be a pleader he shall also be expelled the Court.

II. Officers, &c. shall not take money otherwise than they ought to do, on pain to pay the treble thereof to the complainants.

DISCONTINUANCE OF RIGHT OR ESTATE.

11 *Hen.* 7, *C.* 20. If a woman that hath an estate in dower for life, or in tail jointly with her husband, or only to herself, or to her use, in any lands, &c. of the inheritance or purchase of her husband, or given to the husband and wife by the husband's ancestors, or any seised to the use of the husband or his ancestors, do sole, and with an after taken husband, discontinue, or suffer a recovery by covin, it shall be void; and he to whom the land ought to belong after the death of the said woman, may enter, (as if the woman were dead) without discontinuance or recovery.

II. Provided that the woman may enter after the husband's death—but if the woman were sole, the recovery or discontinuance barreth her forever.

III. This act extends not to any recovery or discontinuance with the heir next inheritable to the woman, or by his consent of record enrolled.

DOWER.*

20 *Hen.* 3, *C.* 1. A woman deforced of her dower or *quarantine*, in a writ of dower, shall recover damages, viz. the value of the dower from her husband's death, to the day of the recovery of her dower, and the deforcer shall be amerced.

3 *Ed.* 1, *C.* 49. In a writ of dower *(unde nihil habet)* the writ shall not abate by the exception of the tenant, that she hath received her dower of another before the writ purchased, unless he can shew that she received part of her dower of himself, and in the same term before the writ purchased.

13 *Ed.* 1, *C.* 4. The wife shall be endowed as well where land was recovered against her husband by default as by covin; so that albeit the land was lost by the husband's default, yet that shall be no good allegation for the tenant, but he must then proceed and shew his right, otherwise the wife shall recover.

When tenants in dower, in frank marriage, by the curtesy, for life or in tail, lose their land by default, and the tenant is compelled to shew his right, they may vouch the reversioner if they have warranty; and then the plea shall pass between the tenant and the warrantor, according to the tenor of the writ, by which the tenant recovered by default; and so, from many actions, they shall resort to one judgment, viz. that the demandant shall recover that demand, and the tenant shall go quit.

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* Though the whole of these Statutes are not in force, they serve to reflect light upon the subject of dower, as regulated by our Acts of Assembly.

Here, if the action of such a tenant, which is compellable o shew his right, be moved by a writ of right, albeit the great assize or battle cannot be joined by words accustomed, yet shall it in that case, be joined by words convenient.

If the wife be wrongfully endowed by the guardian during the minority of the heir, he (at full age) shall be righted; yet shall the wife retain her just dower if she make her title good.

1 *Ed.* 6, *C.* 12. The wife shall be endowed albeit her husband were attainted, convicted, or outlawed for treason or felony, saving the right of others.—*This clause is altered for treason by* 5 *Ed.* 6, *C.* 12.

13 *Ed.* 1, *C.* 39. If a wife leave her husband and continue with her adventurer, she shall be barred of her dower, if convict thereupon, except her husband be willingly reconciled to her, and allow her to live with him.

ELECTION.

3 *Ed.* 1, *Cap.* —. None shall disturb any (by force of arms, malice, or menaces) to make free election, on pain of great forfeiture.

ESTREPEMENT.

6 *Ed.* 1, 13. No waste shall be made hanging a suit for the land.

EXECUTION.

12 *Ed.* 1, *C.* 18. He that recovereth a debt or damages, may, at his choice, have a *fieri facias* of the chattels of the debtor, or a writ for the sheriff to deliver him all the chattels of the debtor (except oxen and plough beasts) and the moiety of his land, by a reasonable extent till the debt be levied; and if he be ejected out of the land, he shall have an assize and afterwards a writ of disseisin, if need be. And this last writ is called an *elegit*.

13 *Ed.* 1, *C.* 45. For all things recovered before the King's Justices, or contained in fines (whether contracts, covenants, obligations, services for customs acknowledged, or any other things enrolled) a writ of execution shall be within the year, but after the year a *scire facias*; whereupon, if satisfaction be not made or good cause shewn, the sheriff shall be commanded to do execution.

32 *Hen.* 8, *Cap.* 5. If lands delivered in execution on just cause, be recovered without fraud from the tenant in execution, before he shall have levied or received his whole debt and damages, he may have a *scire facias* out of the Court from whence he had the execution, returnable into the same Court at a day (40 days at least) after the date of such *scire facias*; at which day, if the defendant, being lawfully warned, make default or do not appear, and do not plead a sufficient cause (other than the former acceptance of the land) to avoid the said suit, for the residue of the said debt and damages, the said Court shall issue forth a new execution for the levying thereof.

5 *Geo. II, C.* 7. Houses, lands, negroes, and other hereditaments, and real estates, within any of the plantations belonging to any person indebted, shall be liable to, and chargeable with, all just debts, duties and demands, of what nature or kind soever, owing by such person, and shall and may be assets for the satisfaction thereof, in like manner as real estates are, by the law of England, liable to the satisfaction of debts due by bond, or other specialty; and shall be subject to the like remedies, proceedings and process in any Court of Law or Equity, in any of the plantations, for seising, extending, selling, or disposing of any such houses, lands, negroes, and other hereditaments and real estates, towards the satisfaction of such debts, duties, and demands, and in like manner as personal estates, in any of the said plantations, are seised, extended, sold, or disposed of, for the satisfaction of debts.

EXECUTORS.

13 *Ed.* 1, *C* 23. Executors shall have a writ of account, and like action and process in the same writ, as their testator should, if he had lived.

4 *Ed.* 3, *C.* 7. Executors shall have an action for a trespass done to their testator, as for their goods and chattels carried away, in his life; and shall recover their damage, in like manner, as he, whose executors they are, should have done, if he had lived.

9 *Ed.* 3, *C.* 3. In a writ of debt brought against executors, they shall have but one essoin amongst them, before appearance, and another after, so that they shall not fourch* by essoin.

Here, though the sheriff upon the summons, return *nihil*, yet an attachment shall be awarded; and upon *nihil* also returned thereupon, the great distress; and then he or they that appear shall answer.

Albeit some of them after appearance make default at the return of the great distress, yet shall he or they be put to answer, that first appeared, at the great distress so returned.

If judgment pass for the plaintiff, he shall have judgment and execution, against them that have pleaded, and against all others named in the writ, of the testator's goods, as well as if they had all pleaded.

And may sue in this case, according to the law formerly used, (if he please) notwithstanding this statute.

25 *Ed.* 3, *C.* 5. Executors of executors shall have actions of debt, account, and of goods carried away of the first tes-

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* From *fourchir*, Fr. to put off.

tator's, and execution of statute merchants and recognizances made unto them, and shall also answer unto others so far forth, as they shall recover of the first testator's goods, as the first executor should have done.

21 *Hen. VIII, C.* 4. That part of the executors which take upon them the charge of a will, may sell any land devised by the testator to be sold, albeit the other part which refuse will not join with them.

45 *Ed. C.* 8. If any person shall obtain any goods or debts of an intestate, or releases, or other discharges, of any debt or duty (which belonged to the intestate) by fraud, as by procuring the administration to be granted to a stranger of mean estate, and not to be found, with intent thereby to obtain the intestate's estate, and not upon valuable consideration, or in satisfaction of some just debt, answerable to the value of the goods so obtained in such case, such person shall be chargeable as executor of his own wrong, so far as the value of the goods or debts so obtained shall amount unto. Howbeit he shall be allowed such reasonable deductions, as other executors or administrators ought to have.

EXTORTION.

3 *Ed.* 1, *C.* 26. No sheriff, or other officer of the King, shall take any reward to do his office, but shall be paid by the King: and if he do so, he shall render the double, and be punished at the King's will.

3 *Ed. C.* 30. Officers, &c. shall not commit extortion, on pain to render the treble, and to be otherwise punished at the King's will.

FELONS AND FELONY.

1 *Ed.* 2. It shall be felony in any person or persons to break prison, being in for felony, or otherwise not.

3 *Hen. 7, C. 2.* It is felony to carry away a woman, wife, widow, or maid, against her will, having land or goods, or being heir apparent to her ancestors—and the procurators, abettors, and receivers, in such an offence, shall be also deemed principal felons. This shall not extend to any that takes a woman, claiming her as his ward or bond-woman.

25 *Hen. VIII. C.* 6. *revived and confirmed by* 5 *El. C.* 17. The crime against nature, is made felony, and the offender therein shall not have his clergy.

21 *Hen. VIII, C. 7.* Servants that go away with, or otherwise embezzle their master's or mistress' goods, to the value of 40*s.* with an intent to steal them (being put in trust therewith) shall be punished as felons.—*Made perpetual by* 5 *El. C.* 10.

[TO BE CONTINUED.]